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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals
For the Fifth Circuit

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Quentin Rogers, et al., Appellants, submit herewith

this statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, entered March 20, 1981, affirming the judgment of the United States District Court for the Southern District of Georgia, Augusta Division, entered September 29, 1978 (Findings of Fact and Conclusions of Law filed October 26, 1978), which (1) declared unconstitutional an Act of the General Assembly of Georgia (Ga. Laws 1911, p. 390) providing for the election at-large of the five (5) members of the Board of Commissioners of Burke County, Georgia; (2) ordered the terms of the five incumbents cut short; and (3) ordered that a special election be held for the election of five (5) Commissioners from five, single-member districts pursuant to a plan proposed by plaintiffs and approved by the district court.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in construing this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), as holding that proof of the voting dilution criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), is still sufficient to establish an *inference* of purposeful discrimination in the retention of an at large voting system in effect since 1911, found by the district court below to have been "racially neutral" when adopted, and that the only effect of *Bolden* is to hold that the *Zimmer* criteria are no longer sufficient to

establish a *presumption* of purposeful discrimination in the retention of the at large system?

(2) Whether the Court of Appeals also erred in holding that another aspect of *Bolden* is to require courts in voting dilution cases to attribute controlling significance to the question whether the political body in issue has been unresponsive to the needs of the black community, contrary to the principle that courts can not resolve purely political questions for which judicially manageable standards are lacking?

(3) Whether the Court of Appeals erred in holding that plaintiffs had carried the burden of proving a case of purposeful discrimination in the retention by Burke County of its at-large system of electing its five county commissioners, based upon evidence of the *Zimmer* criteria, no stronger than that held insufficient in *Bolden*, plus a finding of a "depressed socio-economic status" affecting blacks in Burke County? Embraced within the foregoing is the subsidiary question as to whether the action of the Court of Appeals is tantamount to invalidating an at large plan without requiring a showing of purposeful discrimination.

(4) Whether the Court of Appeals erred in holding that a case of unconstitutional vote dilution arising from an at large system of election can be established under the Fifteenth Amendment?

(5) Whether the doctrine of unconstitutional dilution of voting rights arising from an at large election system is applicable to county governing bodies?

(6) Whether, assuming that even after *Bolden*, the *Zimmer* criteria are still sufficient to give rise to an inference of purposeful discrimination as held by the Court of Appeals below, the finding in this case is nevertheless clearly erroneous on the evidence presented?

(7) Whether, even assuming that the existing at large plan was unconstitutional, the district court below erred in ordering into effect a single member districting plan submitted by plaintiffs, deliberately gerrymandered to favor plaintiffs, in lieu of a plan submitted by defendants, without having first found and declared the defendants' plan to be invalid and insufficient in law, and without having afforded defendants an opportunity to submit their plan for preclearance under Section 5 of the Voting Rights Act, 42 USCA 1973c, contrary to the decisions in *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), and *Berry v. Doles*, 438 U.S. 190 (1978).

PARTIES TO THE PROCEEDING

The parties to this proceeding are stated in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATE STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

THE QUESTIONS ARE SUBSTANTIAL 9

(1) For At Least The Fourth Time, The Court Of Appeals For The Fifth Circuit Has Refused In Voting Dilution Cases, To Follow The Decisions Of This Court 9

(2) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court 16

(3) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions 17

TABLE OF CONTENTS (Continued)

Page

(4) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution 19

(5) A Case Of Unconstitutional Dilution Of Black Voting Rights Was Not Established Here 22

(6) The Fifteenth Amendment Does Not Reach A Voting Dilution Case 26

(7) The Dilution Doctrine Does Not Apply To County Governing Bodies 27

(8) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act 28

CONCLUSION 28

APPENDIX A 1a

APPENDIX B 61a

APPENDIX C 99a

TABLE OF AUTHORITIES

CASES: Page

Ausberry v. City of Monroe, 456 F.Supp. 460 (D.C. La. 1978) 15

Baker v. Carr, 369 U.S. 186 (1962) 18

Berry v. Doles, 438 U.S. 190 (1978) iv,28

Blacks United For Lasting Leadership v. Shreveport, 571 F.2d 248 (C.A. 5th 1978) ..13,15

Bolden v. City of Mobile, 423 F.Supp. 384 (D.C. Ala. 1970) 23

Bolden v. City of Mobile, 571 F.2d 238 (C.A. 5th 1978) 7,10,13,15,22

Boyle v. Wells, 103 F.2d 237 (C.A. 6th 1939), cert. den. 308 U.S. 579 30

Calderon v. McGee, 584 F.2d 66 (C.A. 5th 1978) 15

Cipriano v. Houma, 395 U.S. 701 (1969) 20

Cooper v. Aaron, 358 U.S. 1 (1958) 14

Corder v. Kirksey, 585 F.2d 708 (C.A. 5th 1978) 15

Criterion Club of Albany v. Commrs. of Dougherty County, 594 F.2d 118 (C.A. 5th 1979) 15

Cross v. Baxter, 604 F.2d 875 (C.A. 5th 1979) ...15

Cross v. Baxter, 639 F.2d 1383 (C.A. 5th 1981) ..15

TABLE OF AUTHORITIES (Continued)

Page

David v. Garrison, 553 F.2d 923 (C.A. 5th 1977) 15

East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) 6,10

Engleman v. Cahn, 425 F.2d 954 (C.A. 2nd 1969), cert. den. 397 U.S. 1009 30

Ex Parte Howard, 9 Wall. 175 (1870) 14

Ex Parte Milligan, 4 Wall. 2 (1866) 30

Hendrix v. McKinney, 460 F.Supp. 626 (D.C. Ala. 1978) 15

Hill v. Stone, 421 U.S. 289 (1975) 20

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) 7,15

Kirksey v. City of Jackson, 625 F.2d 21 (C.A. 5th 1980) 15,23

Kirksey v. City of Jackson, 506 F.Supp. 491 (D.C. Miss. 1981) 15

Levin v. Mississippi River Fuel Corp., 386 U.S. 162 30

Lodge v. Buxton, 639 F.2d 1358 (C.A. 5th 1981) 1,8,9,22

McIntosh County NAACP v. City of Darien, 605 F.2d 753 (C.A. 5th 1979) 15

TABLE OF AUTHORITIES (Continued)

Page

McMillan v. Escambia County, 638 F.2d 1239 (C.A. 5th 1981) 16,27

Milliken v. Bradley, 418 U.S. 717 (1974) 26

Mobile, City of, v. Bolden, 446 U.S. 55 (1980) .*passim*

Moore v. Brown, 65 L.Ed.2d 1158 (1980) 12

Nevett v. Sides, 533 F.2d 1361 (C.A. 5th 1976) 12,15

Nevett v. Sides, 571 F.2d 209 (C.A. 5th 1978) .*passim*

New Orleans, City of, v. Dukes, 427 U.S. 297 (1976) 2

New York, etc., R. Co. v. Henagan, 364 U.S. 441 (1960) 30

Paige v. Gray, 538 F.2d 1108 (C.A. 5th 1976) 15

Parnell v. Rapides Parish School Board, 563 F.2d 180 (C.A. 5th 1977) 15

Rogers v. Lodge, 439 U.S. 948 (1978) 8

Sanchez v. McDaniel, 615 F.2d 1023 (C.A. 5th 1980) 28

Thomasville Branch, NAACP v. Thomas County, 571 F.2d 257 (C.A. 5th 1978) 13,15

United States v. Georgia, 436 U.S. 941 (1978) 5

United States v. Supervisors of Forrest County, Mississippi, 571 F.2d 951 (C.A. 5th 1978) 15

TABLE OF AUTHORITIES (Continued)

Page

United States v. Uvalde School District, 625 F.2d 547 (C.A. 5th 1980) 12,16,27

Voter Information Project v. Baton Rouge, 612 F.2d 208 (C.A. 5th 1980) 15

Wallace v. House, 538 F.2d 1138 (C.A. 5th 1976) 15,30

Washington v. Davis, 426 U.S. 229 (1976) .. 7,10,29

Whitcomb v. Chavis, 403 U.S. 124 (1971) 26

White v. Regester, 412 U.S. 755 (1973) 18,21

Wise v. Lipscomb, 437 U.S. 535 (1978) iv,27,28

Zimmer v. McKeithen, 485 F.2d 1297 (C.A. 5th 1973) ..... *passim*

CONSTITUTIONAL PROVISIONS:

Georgia Constitution, §2-5302 25

Georgia Constitution, §2-5501 25

STATUTES:

Ga. Code §23-101 3

Ga. Code §23-803 4

Ga. Code §34-1015 4

Ga. Code §34-1413 4

Ga. Laws 1911, p. 390, 391 ..... ii, 1-4

Ga. Laws 1929, p. 548 3

Ga. Laws 1931, p. 400 3

TABLE OF AUTHORITIES (Continued)

Page

Ga. Laws 1964, Ex. Sess., pp. 26, 174 4

Ga Laws. 1970 Vol. I, pp. 347, 380, 369 4,5

Ga. Laws 1975 Vol. II, p. 4506 3,5

28 USCA 1254(2) 2

42 USCA 1973c iv,5,28

42 USCA 1983 1

MISCELLANEOUS:

87 Harv. L.R. 1851, 1857 (1974) 27,29

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OPINIONS BELOW

The opinion of the district court below is not reported, but is appended hereto as "Appendix B". The decision of the Court of Appeals affirming the decision of the district court is reported as *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981). A copy is appended hereto as "Appendix A".

JURISDICTION

This action was brought by Appellees, plaintiffs below, in the United States District Court for the Southern District of Georgia, Augusta Division, pursuant to 42 USCA 1983, attacking the constitutionality of an act of the General Assembly of Georgia approved August 21, 1911 (Ga. Laws 1911, p. 390), which created a Board of Commissioners as the governing authority of Burke County, Georgia, and provided for the county-wide election of the five Commissioners. Plaintiffs contended that the at-large election of the Commissioners constituted a dilution of the voting rights of black voters in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. After trial, the district court entered order granting the relief prayed for on September 29, 1978, holding the county-wide voting law to be unconstitutional, and ordering that new elections be held in November, 1978, to elect five new commissioners from single member districts according to a districting plan presented by plaintiffs. The Court of Appeals affirmed, on March 20, 1981, with Judge Henderson dissenting. The jurisdiction of the Supreme Court to review

this decision on appeal is conferred by 28 USCA 1254(2), the Courts below having held a Georgia statute to be unconstitutional as being repugnant to the Constitution of the United States. Appellants did not file a motion for rehearing. Appellees filed a motion for rehearing directed only to an error in the opinion of the Court of Appeals reciting an incorrect population figure for Burke County. This motion was granted by order entered April 8, 1981 "as to the typographical errors." Notice of Appeal was filed March 25, 1981 in the Court of Appeals for the Fifth Circuit. Cases sustaining the jurisdiction of this Court on appeal are *City of Mobile v. Bolden*, 446 U.S. 55, 64 L.Ed.2d 47 (1980), and *City of New Orleans v. Dukes*, 427 U.S. 297, 49 L.Ed.2d 511 (1976).

STATE STATUTE INVOLVED

"That from and after the passage of this Act, there shall be created and established a Board of Commissioners of Roads and Revenues for the County of Burke in the State of Georgia, consisting of five persons who shall be elected by the qualified voters of said county at the general election to be held on the first Wednesday in October in the year 1912, and at each subsequent, alternate, general election, which election shall be held under the rules, regulations and laws governing the election of county officers in the county of Burke and said five persons shall possess the qualification of being resident freeholders of said County for at least three years prior to said election, shall be at least 28 years of age and eligible to election as a member of

the General Assembly of the State of Georgia." (Ga. Laws 1911, pp. 390, 391).

STATEMENT OF THE CASE

This case, instituted on April 5, 1976, by eight black citizens of Burke County, Georgia, against the five Commissioners of Burke County and the County Board of Elections,[1] attacked as an unconstitutional dilution of black voting rights, the at large system of electing the five Commissioners of Burke County, which had been in effect by law since 1911 (Ga. Laws 1911, p. 390).[2]

Burke County is one of the 159 Counties of Georgia, Ga. Code §23-101. According to the 1970 Census, the county had 18,255 persons,[3] of whom 10,988, or 60.19%, were black. There were 4,909 white persons of voting age (18 and older) and 5,617 black persons of voting age in the county. Stated differently, blacks con-

---

1 The action originally was brought against the probate judge rather than the Board of Elections. On learning that the duty of conducting elections in Burke County had been transferred by statute from the Probate Judge to a "Board of Elections" (Ga. Laws 1975 Vol. II, p. 4506), the plaintiffs substituted the latter for the probate judge. Defendant Buxton, whose name appears in the style of the case as it appears in the Court below, was superseded on the Board by Mr. Rogers, who was substituted as a party defendant.

2 In 1929, the Act was amended to provide for appointment of the 5 commissioners by the grand jury in 1932 (Ga. Laws 1929, p. 548), but before the Act was ever put into effect, it was amended in 1931 so as to revert back to election by the people (Ga. Laws 1931, p. 400).

3 The chart in foot note 2 of the Court of Appeals' decision is in error, and was the subject of Appellees' Motion for Rehearing.

stituted 53.36% of the total voting age population. (P.E. 58). The black population appears to be declining each year (P.E. 192). In 1978, there were 6,373 persons registered to vote, of whom 2433 or 38%, were black (D.E. 57, R. 776).

Since 1911, the County has been governed by a board known as the "Board of Commissioners of Burke County." See Ga. Code §23-803. This board was created by the Act of 1911, and has remained in the same form to the present day. The Board consists of five (5) members, elected by all the voters of the County for four year terms. The County has never been divided into districts, either for the purpose of creating residency districts, or for the purpose of having the commissioners elected by the voters in the district. All five commissioners are elected at one time, the last elections having been held in 1980.

The Georgia Election Code of 1964 provided that in order to be nominated or elected, candidates were required to receive a majority of the votes cast in the primary or election, and in the event no candidates received a majority in the first primary or election, a runoff was required to be held (Ga. Laws 1964, Ex. Sess., pp. 26, 174). The same act also provided that where two or more public officers having the same title are to be voted on, each candidate must qualify for a specific post or position. (Id., p. 89). These provisions were re-enacted in 1970 (Ga. Laws 1970 Vol. I, pp. 347, 380, 369) and now appear as Code Sections 34-1413 and 34-1015, respectively, and were approved by the Attorney General of the United States under Section 5 of the Voting

Rights Act of 1965, 42 USCA 1973c. See *United States v. Georgia*, 436 U.S. 941 (1978).

So far as known, no black has ever served as a member of the Board of Commissioners.

Until 1976, all voters registered at the Court House, at the same office where they purchase auto tags and return their property for taxes (T. 801, 784, 722-3). On December 5, 1975, the Burke County Improvement Association, a black organization (T. 668), requested the Commissioners to establish additional registration sites (P.E. 102, T. 946), and the Commissioners responded by establishing three additional sites at Midville, Sardis and a country store, dispersed geographically over the County (T. 193, 733, 947, D.E. 4). There are 11 polling places in the County (T2. 102).

Until 1970, the county Democratic Executive Committee conducted primary elections in the County (T2. 99; R. 932). From 1970, the Probate Court (formerly Ordinary) conducted the primaries also (T. 932). See Ga. Laws 1970 Vol. I, p. 347. In 1975, the conduct of all elections was transferred to a three-man Board of Elections (T. 932). See Ga. Laws 1975 Vol. II, p. 4506. Segregation at the polls was abolished in 1964 (T. 933).

There was no evidence that the 1911 county-wide law was enacted with discriminatory intent or purpose, and plaintiffs appear to concede as much, pointing out that black voting had already been eliminated in Georgia on a statewide basis by an Act of 1908 (R. 152). The district court below held that the enactment of the 1911 Act was neutral (R. 776, 791). There was also no

evidence that blacks had any difficulty registering, voting or getting on the ballot in Burke County; indeed, the evidence was to the contrary (T. 93-6; 177, 322, 339, 356, 631, 710, 741, 765, 784, 804-6, 846, 851, 884-7, 932, 949-950; T2. 32, T2. 105, T2. 144). The Court also found to this effect (R. 788).

The district court held that a case of unconstitutional vote dilution had been made out under the criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), aff'd. sub nom *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals."

The decision of the district court paid lip service to the proposition that purposeful discrimination must be shown, declaring that "a demonstration of intention is necessary under both fourteenth and fifteenth amendments as a requisite to a finding of unconstitutional vote dilution. . ." (Findings, p. 4) and that the county-wide voting act, when adopted in 1911, was not enacted with discriminatory intent, being characterized as "racially neutral when adopted. . ." (Findings, p. 7), and "neutral in origin. . ." (Findings, p. 22). Nevertheless, the Court below held the county-wide voting plan to be unconstitutional because ". . . [I]t is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes. Compare Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978)" (Findings, p. 7). In order to reach this conclusion that county-wide voting had been *maintained* for a discriminatory purpose, the district court purported to follow the prior deci-

sions applying the so-called *Zimmer* criteria: "Functionally, this added requirement has not changed the district court's task since a finding of racially discriminatory dilution under the Zimmer criteria raises an inference of intent, and therefore . . . a finding under the criteria satisfies the intent requirement. . . Nevett II, 571 F.2d at 217" (Findings, p. 5). Accepting this premise, the district court then proceeded to analyze the *Zimmer* primary and enhancing factors, and also another allegedly separate "similar" factor gleaned from *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir. 1977), i.e., "a depressed socio-economic status" (Findings, pp. 6, 16). Relying on this analysis, the district court held that a case of unconstitutional dilution had been established.

This decision was rendered prior to this Court's decision in *City of Mobile v. Bolden*, supra, but after the Court of Appeals' decisions in *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978) and *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978), recognizing that a showing of purposeful discrimination was now necessary in order to establish a case under the Fourteenth Amendment, but concluding that purposeful discrimination could still be inferred from the "impact or effect" type evidence previously held sufficient under *Zimmer* which had been developed prior to *Washington v. Davis*, 426 U.S. 229 (1976).

By way of relief, the district court ordered that a special election be held in the 1978 November General then shortly to be held at which five (5) new Commissioners would be elected from single-member districts according to a plan presented by plaintiffs. (The in-

cumbents had been elected in 1976). On November 3, 1978, this Court granted a stay "pending final disposition of the appeal to the United States Court of Appeals for the Fifth Circuit." *Rogers v. Lodge*, 439 U.S. 948 (1978).

On March 20, 1981, the Court of Appeals affirmed the judgment of the district court, with Judge Henderson dissenting. *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981).

To begin with, the majority opinion recognizes that the decision below must stand or fall on a finding of the "existence of a discriminatory purpose for the maintenance of such a system" (639 F.2d at 1363, f.n. 7). The majority then accuses this Court of misconstruing its 1978 decisions in *Nevett II* and *Bolden* (639 F.2d at 1368, f.n. 22). Having done this, and analyzed the spate of opinions in *Mobile v. Bolden*, supra, the majority concludes that *Bolden* has not really changed the law, except to this limited extent:

> (1) The *Zimmer* criteria are rejected only "to the extent that the Court, in Bolden, *presumed* the existence of a discriminatory purpose from the proof of some of those factors" (639 F.2d at 1373). Circumstantial evidence, including these factors may, however, be sufficient to give rise to an *inference* of discriminatory intent, as distinguished from a *presumption*. (639 F.2d at 1373-1381).
>
> (2) Regardless of how strong the other circumstantial evidence may be, however, a finding essential to showing a case of unconstitutional dilution is a showing of unresponsiveness by the

governing bodies in question to the needs of black citizens, for "The Supreme Court implicitly concluded in *Bolden*, as we explicitly do today, that absent such proof of unresponsiveness, a prima facie case can not be established. Zimmer has been rejected to the extent it holds otherwise." (639 F.2d at 1373).

The majority found additional circumstantial evidentiary support for its holding in the finding below of a depressed socio-economic status (639 F.2d at 1376).

Judge Henderson in dissent declares that *Mobile v. Bolden* has done more than reaffirm the necessity of a showing of discriminatory intent, for it has also abolished the "aggregate of factors approach of Zimmer v. McKeithen . . ."; that the same evidence held insufficient in *Mobile* was relied on by the district court below; and that the judgment should be vacated and remanded for reconsideration in the light of *Mobile*.

THE QUESTIONS ARE SUBSTANTIAL

(1) For At Least The Fourth Time, The Court of Appeals For The Fifth Circuit Has Refused In Voting Dilution Cases, To Follow The Decisions Of This Court

The unwillingness of the Court of Appeals to follow the decisions of this Court in voting dilution cases is unprecedented.

The principles under which the Court of Appeals has resolved voting dilution claims were originally formulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th

1973), aff'd sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). *Zimmer* was decided prior to *Washington v. Davis*, 426 U.S. 229 (1976), and not unsurprisingly was based on a "discriminatory impact" rationale, for in that decision, the Court of Appeals stated "that designedly *or otherwise*, an apportionment scheme, under the circumstances of a particular case, *would operate* to minimize or cancel out the voting strength of racial or political elements to the voting population. . ." 485 F.2d at 1304 (emphasis supplied). Not only does the language "or otherwise" and "operate" connote impact or effect as distinguished from purpose, but an analysis of the *Zimmer* criteria themselves points toward the same conclusion, for the criteria at best give rise to an inference only as to how the voting arrangement *affects* a group, and says nothing of the intent or purpose with which it was adopted or retained. Indeed, only by assumption can it be said that the *effects* derive from the voting arrangement itself, for other factors may and often do cause the effects independently of the at large election system.

After *Washington v. Davis*, supra, the Court of Appeals had occasion to consider the question as to what effect the discriminatory intent or purpose requirement had made on the *Zimmer* criteria. That question was addressed in *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978), decided the same day as *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978), the Court using the *Nevett* opinion as the vehicle for announcing the controlling principles applied to four dilution cases decided that day. Viewed in the light of *Washington v. Davis*, it should have been apparent that the *Zimmer* criteria no longer estab-

lished a prima facie case of dilution. The Court of Appeals held to the contrary, however.

First, the Court conceded that a showing of discriminatory purpose was now necessary. 571 F.2d at 219. Second, the Court conceded that language in *Zimmer* related to impact rather than to purpose: "The second avenue, however, seems to allow plaintiffs to succeed under a dilution rationale without establishing intentional discrimination" 571 F.2d at 225. Third, in what can be characterized only as an amazing process of reasoning, the Court concluded that the *Zimmer* criteria themselves had been utilized to establish an inference of discriminatory purpose: "We hold today that a finding of dilution under Zimmer raises an inference of intentional discrimination, and therefore the essential element of intent was present in each of these cases." 571 F.2d at 225. Apparently, the Court of Appeals and the district courts in all prior dilution cases had been finding discriminatory intent without realizing it! This holding, however, is precisely the proposition that *Bolden* rejected, on the ground that the *Zimmer* criteria all relate to impact or effect and not intent: "That approach, however, is inconsistent with our decision in Washington v. Davis, supra and Arlington Heights, supra. Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not itself sufficient proof of such a purpose" (64 L.Ed.2d at 62). Consequently, this is the first time that the Court of Appeals refused to follow the law as declared by this Court.

To the rational mind, this Court's holding in *Bolden* was clear and unambiguous. On remand of *Bolden*, however, both the district court and the Court of Appeals, without further findings on intent, reinstated the very district plan previously ordered in the Board of Education case under a *Zimmer* finding, and which this Court had vacated. When Mr. Justice Powell expressed "serious concerns about the process of reasoning underlying the District Court's entry of a preliminary injunction", but nevertheless denied a stay because of peculiar circumstances of timing, *Moore v. Brown*, 65 L.Ed.2d 1158 (Sept. 5, 1980), the Court of Appeals on remand expedited the appeal and vacated the judgment in part. Therefore, for the *second* time, the Court of Appeals refused to respect a decision of this Court, and only finally did so reluctantly after a strongly worded opinion by Mr. Justice Powell.

Later, in *United States v. Uvalde School District*, 625 F.2d 547 (C.A. 5th 1980), the Court reiterated again its belief that its reasoning in *Bolden* and *Nevett* "survives the Supreme Court's decision intact" (625 F.2d at 553). This was the *third* time.

Now, for the *fourth time*, the Court of Appeals has refused to follow the decisions of this Court. It has done so by resorting to a facile distinction based upon the difference between an inference and a presumption, a distinction not supported in the least by this Court's decision in *Bolden*. The majority opinion asserts the startling proposition that the only change wrought by this Court's decision in *Bolden* regarding the *Zimmer* criteria is that they now only permit an *inference* of discrimina-

tory purpose to be drawn, whereas before, these criteria gave rise to a mandatory *presumption*. As stated by the Court: "We conclude that they rejected the use of the Zimmer criteria to the extent that this Court, in Bolden, *presumed* the existence of a discriminatory purpose from the proof of some of those factors (639 F.2d at 1373) * * * Appellant contends that, in light of Bolden, the use of the Zimmer criteria to draw an inference of intent is erroneous. Such a broad absolute reading of Bolden seems unwarranted and incorrect (639 F.2d at 1374). * * * Those (Zimmer) factors are relevant only to the extent that *they allow the trial court to draw an inference of intent*" (639 F.2d at 1375). The statement stands square in the face of a reference in *Nevett* that the *Zimmer* criteria "raises an inference of intent" (571 F.2d at 217), and the statement in *Bolden* that "the district court's findings are not clearly erroneous and that these findings amply support the *inference* that Mobile's at-large system unconstitutionally deprecates the value of the black vote" (571 F.2d at 245). We search in vain for any reference in *Nevett, Bolden, Blacks United For Lasting Leadership v. Shreveport*, 571 F.2d 248 (C.A. 5th 1978) and *Thomasville Branch v. Thomas County*, 571 F.2d 257 (C.A. 5th 1978), to the proposition that the *Zimmer* criteria gave rise to any presumption.

In short, the Court of Appeals is back in business at the same old "discriminatory impact" *Zimmer* stand. For the fourth time, a panel of that Court appears unwilling to respect the decisions of this Court.

Despite the fact that the decision of the district court here was rendered prior to *Bolden*, once again, the Court

of Appeals, in a remarkable coincidence, finds that the district judge anticipated the very decision of this Court 2 years later in *Bolden*, to wit: "A court that correctly anticipated how the intent requirement in those cases would be applied to voting dilution cases, as in Bolden, could correctly interpret and apply the law, without the benefit of the Supreme Court's recent opinion. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case." (639 F.2d at 1375-1376). Thus, Judge Alaimo has been elevated to "seer" status by the Court below.

Over 100 years ago, this Court declared "Undoubtedly, it is the duty of all inferior courts to yield a prompt obedience to the mandate of this Court. . ." *Ex Parte Howard*, 9 Wall 175, 182 (1870), and more recently, observed that its decisions interpreting the Constitution stand as the "supreme law of the land", binding on all. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

There can be no greater manifestation of substantiality than that one of the Courts of Appeals seems unable or unwilling to follow the decisions of this Court time after time after time. Added to this is the fact that the dilution doctrine as applied under the *Zimmer* approach represents a drastic intervention into the political affairs of the states, and has been utilized by the Court of Appeals for the Fifth Circuit as a roving commission to restructure local governments so as to insure proportionate racial representation for no reason other than the beliefs of judges that this is the only way representative government can be achieved. One has only to take note of the many reported decisions where

the Court of Appeals and district courts have ordered reorganization of local governing bodies. See *Paige v. Gray*, 538 F.2d 1108 (C.A. 5th 1976); *Wallace v. House*, 538 F.2d 1138 (C.A. 5th 1976); *Parnell v. Rapides Parish School Board*, 563 F.2d 180 (C.A. 5th 1977); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (C.A. 5th 1977), cert. den. 54 L.Ed.2d 454 (1977); *David v. Garrison*, 553 F.2d 923 (C.A. 5th 1977); *Nevett v. Sides*, 533 F.2d 1361 (C.A. 5th 1976); *United States v. Supervisors of Forrest County, Mississippi*, 571 F.2d 951 (C.A. 5th 1978); *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978); *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978); *Blacks United v. Shreveport*, 571 F.2d 248 (C.A. 5th 1978); and *Thomasville Branch, NAACP v. Thomas County*, 571 F.2d 257 (C.A. 5th 1978); *Ausberry v. City of Monroe*, 456 F.Supp. 460 (D.C. La. 1978); *Calderon v. McGee*, 584 F.2d 66 (C.A. 5th 1978); *Corder v. Kirksey*, 585 F.2d 708 (C.A. 5th 1978); *Hendrix v. McKinney*, 460 F.Supp. 626 (D.C. Ala. 1978); *Criterion Club of Albany v. Commrs. of Dougherty County*, 594 F.2d 118 (C.A. 5th 1979); *McIntosh County NAACP v. City of Darien*, 605 F.2d 753 (C.A. 5th 1979); *Cross v. Baxter*, 604 F.2d 875 (C.A. 5th 1979); S.C., 639 F.2d 1383 (C.A. 5th 1981); *Voter Information Project v. Baton Rouge*, 612 F.2d 208 (C.A. 5th 1980); *Kirksey v. City of Jackson*, 625 F.2d 21 (C.A. 5th 1980); S.C., 506 F.Supp. 491 (D.C. Miss. 1981). These are the only *reported* cases. There are many more district court decisions restructuring local government bodies which have never been reported. In *Kirksey v. Board of Supervisors*, supra, the *en banc* Court held that racially gerrymandered districting was mandated in plans designed as a remedy for existing election schemes found to be unconstitutional under the dilution doctrine (554 F.2d at 151).

Armed with the *Zimmer* criteria, the Court of Appeals conceives it to be its mission to effectuate a second Reconstruction. This Court should act promptly and firmly to end this exercise in political intervention.

(2) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court

Not only does the decision below fail to follow the controlling decisions of this Court, it is in direct conflict with a decision of another panel of the same court decided one month earlier. In *McMillan v. Escambia County*, 638 F.2d 1239 (C.A. 5th 1981), another panel of the Fifth Circuit, reached exactly the opposite result, declaring that "*Zimmer v. McKeithen* has been invalidated by *Bolden*," 638 F.2d at 1247, f.n. 16, and that the *Zimmer* factors of whether whites campaign for black votes and whether people in elective positions are responsive to minority needs, are no longer relavant, 638 F.2d at 1248. The *McMillan* case, it is submitted, represents the proper approach to dilution cases, for it focuses upon whether (1) There was evidence of discriminatory intent in enactment, and (2) Whether subsequent thereto efforts to change the law were defeated by racially inspired arguments.

Also, in *United States v. Uvalde School Dist.*, 625 F.2d 547 (C.A. 5th 1980), one panel of the Court of Appeals held that the 15th amendment reaches a dilution claim, whereas another panel held to the contrary in the *McMillan* case, supra.

(3) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions

One of the original *Zimmer* criteria was stated to be "the unresponsiveness of legislators to their particularized interests." 485 F.2d at 1305. As stated, this was one of the four primary criteria. The decision of the Court below now elevates it to controlling significance, for the Court declares:

> "Finally, it appears that the Supreme Court has somewhat increased the burden of proof on plaintiffs in such cases. In Zimmer, this Court granted relief despite the factual conclusion that the police juries and school board in question were not unresponsive to the needs of the Black community. The Supreme Court implicitly concluded in Bolden, as we explicitly do today, that absent such proof of unresponsiveness a prima facie case can not be established. (639 F.2d at 1373-4)
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> * * * * * *
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> "Unresponsiveness is a necessary element to a plaintiff's maintenance of an action such as this." (639 F.2d at 1374).

To begin with, nothing in this Court's decision in *Bolden* supports this part of the Court of Appeals' decision. To the contrary, the plurality opinion observed that black citizens discriminated against in jobs and other benefits had their remedies by suing directly for

the benefit involved, 64 L.Ed.2d 62, and that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful". (64 L.Ed.2d at 63).

In this case, plaintiffs launched an exhaustive inquiry into every resolution, vote, program, appropriation, road paving and response made by the Burke County Commissioners during the last 40 years. Some 289 exhibits were introduced by plaintiffs, most of which addressed this issue. The district court's findings devoted some 5 pages to it, (R. 780-784), ranging from committee appointments and road pavings to rejection of federal aid programs benefitting black citizens. While there well may be some language in *White v. Regester*, 412 U.S. 755, 769 (1973) supporting the responsiveness issue, neither this Court nor any lower Court has yet confronted the issue whether judicial inquiry into such a question is precluded by the political question doctrine. If there is anything left of this doctrine, it is difficult to see how any question could be more political in nature, as involving "policy determinations for which judicially manageable standards are lacking." *Baker v. Carr*, 369 U.S. 186, 226 (1962). Not only must a court resolve the controversial and partisan question as to what are the legitimate expectations of various segments of the population, but the Court must also adjudicate such questions as priorities, validity of compromises, and whether failure to grant a particular deserved benefit was nevertheless justified for other reasons. Whether a legislative body is responsive or unresponsive to legitimate needs of the people is

the very question which under our system of government is reserved to the voters. A federal court composed of judges elected by no one and enjoying life tenure is hardly such a broadly-based democratic institution as should be entrusted with such choices.

(4) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution

Conceding that the district court's decision below was rendered prior to this Court's decision in *Bolden* holding the *Zimmer* criteria to be insufficient, the Court of Appeals gives as one additional reason for its affirmance, the fact that the district court also relied on another factor, a depressed socio-economic status. The Court declared:

> "In its order the District Court said, 'It must be remembered that the Court is not limited in its determination to the Zimmer factors, rather the Court may consider the Zimmer factors, "or similar ones". Kirksey v. Board of Supervisors of Hinds County, 554 F.2d at 143. One "similar factor" considered in Kirksey which did not seem to be an explicit primary factor in the Zimmer formula, is a depressed socio-economic status, "which makes participation in community processes difficult." Id. This is an important factor and must be considered here.' Order at 6. On the basis of these statements, as well as the District Court's detailed analysis of the Kirksey factors, we conclude that the District Court did not treat the Zimmer cri-

teria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent." (639 F.2d at 1376).

At pages 1378-1379, the Court reviewed the evidence relied on by the district court as to this factor.

To begin with, this Court has never held that just because an identifiable segment of the population is disadvantaged economically or socially as compared to another group, this entitles the former to some special dispensation in the area of voting rights. Of course, a citizen can not be deprived of the right to vote because he owns no property. *Cipriano v. Houma*, 395 U.S. 701 (1969); *Hill v. Stone*, 421 U.S. 289 (1975). The question here, of course, is not whether poverty or social deprivation can be penalized, but whether the state is required to discriminate in favor of its victims because of it.

With respect to the matter at issue here, blacks are not the minority. They constitute 60.19% of the total population according to the 1970 census, and 53.39% of the voting age population. In Burke County, they have only to register and vote, and they could control all elections. The undisputed evidence here is that blacks have suffered no difficulty in registering, voting or running for office. Every witness presented by plaintiffs, without exception, testified to this effect.

Moreover, a depressed socio-economic status is at best simply more of the "impact" or "effect" type evidence which the Court of Appeals seems to be so preoccupied with. Even here, it is a long jump to infer dis-

crimination in political access from the fact that one group has less money or social standing than another.

Lastly, the fact of a depressed socio-economic status seems to be but one part of the *Zimmer* primary factor which deals with whether "the existence of past discrimination in general precludes the effective participation in the election system." *Zimmer*, supra, 485 F.2d at 1305. Consequently, it is more properly treated as one constituent element of this primary factor, and should not be elevated to separate status in order artificially to bolster an otherwise deficient evidentiary showing. This very approach has characterized the application of the *Zimmer* criteria by the Court of Appeals. In this respect, it should be recalled that two of the criteria deal with "access to the process of slating candidates" and whether "the existence of past discrimination in general precludes the effective participation in the election system" (485 F.2d at 1305). As utilized by the Court of Appeals, the latter factor has tended to gobble up the former, and a finding on the latter is also taken as establishing the former. In this case as in *Bolden*, the Court of Appeals was confronted with the undisputed fact that blacks do have equal access to the slating of candidates in the sense that this term was utilized in *White v. Regester*, 412 U.S. 755, 766-7.[4] Confronted also with the fact that no such evidence existed in either this case or the *Mobile* case, the

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4 Referring to the district court findings, this Court in White v. Regester alluded to the fact that only 2 Negroes had ever been "slated by the Dallas Committee for Responsible Government (DCRG), a white dominated organization that is in effective control of Democratic Party slating in Dallas County." (Id.).

Court of Appeals nevertheless resolved the slating factor in favor of plaintiffs by referring to past discrimination and its alleged inhibiting effects on present participation. *Bolden*, supra, 571 F.2d at p. 243; *Lodge v. Buxton*, supra, 639 F.2d at 1379. In the plurality opinion in *Bolden*, this inconsistency of the Court of Appeals was noted. 64 L.Ed.2d at 61.[5]

Depressed socio-economic status, even when added to the other *Zimmer* factors, does not make out a case of unconstitutional dilution.

(5) A Case Of Unconstitutional Dilution Of Black Voting Rights Was Not Established Here

This case was tried prior to this Court's decision in *Bolden*. Consequently, the district court here, as did the district court and Court of Appeals in that case, relied entirely on the *Zimmer* factors to establish an inference of discrimination in the *retention* of the system. In both cases, the at large law was enacted in 1911 when black participation in voting was no longer a factor and there was no need to resort to at large voting as a discriminatory device. In both cases, the district court found that the at large acts were not adopted for a discriminatory purpose. In both cases, the same type of evidence was

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5 "On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance." (64 L.Ed.2d at 61).

relied upon, and the plaintiffs were found to have succeeded in establishing the same 3 *Zimmer* criteria in both cases. See *Bolden v. City of Mobile*, 423 F.Supp. 384 (D.C. Ala. 1976). Here, the evidence was even weaker than in *Bolden*, for there is no evidence whatever that efforts to change the system were defeated by resort to racial arguments. Here, this case was the first effort to challenge the at large system. The sole means of proving purposeful discrimination in this case was by use of the *Zimmer* criteria, and the added factor of socio-economic deprivation which, as previously shown, is really part of the *Zimmer* factor relating to the effects of past discrimination. There was also evidence in *Bolden* supporting this latter factor. See 423 F.Supp. at 391. In *Bolden*, this Court held that the *Zimmer* criteria are insufficient to make out a case, thereby changing the governing principles. Notwithstanding the Court of Appeals' pronouncement in *Kirksey v. City of Jackson*, 625 F.2d 21 (C.A. 5th 1980), that in a case where the legal principles on which the case was tried have changed by the time of appeal, the proper procedure is to vacate and remand for reconsideration, the Court of Appeals declined to do so here, but upheld the decision below on the basis that the district judge foresaw this Court's decision in *Bolden*, changing the *Zimmer* criteria from *presumption* to *inference* status, and hence the proper legal principles were applied regardless. As previously shown, such a reading of this court's decision in *Bolden* is completely unfounded. In effect, the Court of Appeals below upheld a case of unconstitutional vote dilution on evidence no stronger, and probably weaker, than that held insufficient in *Bolden*. The end result is, of

course, that the Court has invalidated at large voting in Burke County without a showing of purposeful discrimination, either in enactment or in retention of the system.

Moreover, even assuming the continuing validity of the *Zimmer* criteria, the finding below is clearly erroneous for these reasons:

(1) The Court below confused 2 of the *Zimmer* criteria by holding that satisfaction of the factor relating to a showing of continuing effects of prior discrimination also establishes lack of access to slating, despite the fact that the undisputed evidence was that blacks had no difficulty in registering, voting or running for office in Burke County.

(2) The Court below found that a freeholder requirement for registrars precluded black participation (R. 779). This law, Ga. Code §34-605, had been repealed prior to the filing of this suit.

(3) The Court also found, and the Court of Appeals reiterated it (639 F.2d at 1377) that the County only established new registration sites following "friendly persuasion" by the Court at a pretrial conference (R. 783). This is incorrect. These sites were established on February 10, 1976 (D.E. 4) before this case was filed on April 5, 1976, and many months before the first pretrial conference was held on March 4, 1977.

(4) The Court below found that the Commissioners donated public money to buy band uniforms for the private school (R. 784). To the contrary, the evidence

was that the Commissioners *refused* to contribute county money to the *public* high school band because such funds could not legally be used for such purposes (T2. 84, 150, P.E. 37).

(5) The district court found that blacks had been excluded from the local Democratic Executive Committee (R. 788), and the Court of Appeals approved this finding. 639 F.2d at 1378. There was no evidence at all supporting this finding. The evidence showed that these positions were not appointed, but were elected by the people in the Democratic primary; that widespread announcements of the elections therefor were given in the newspapers and radio, and that little interest was exhibited by whites or blacks. (T. 99, 109-110, 148-150, 542, 894-5). It even appears that in recent times, these elections are on a district basis, yet blacks still do not seek them. It is hardly correct to say that blacks have been "excluded" when the positions are elected and blacks simply do not offer.

(6) Much ado was said about segregation in the school system. While the evidence showed that what segregation existed was in small isolated schools under conditions approved by a federal court order, the fact is that the county commissioners have nothing to do with the school system, which is under the complete control of a separate Board of Education vested with plenary power by the State Constitution, Art. VIII, Sec. V, Par. II (§2-5302), including the authority to levy the local taxes necessary therefor. Art. VIII, Sec. VII, Par. I (§2-5501). Acts of a separate governing body, approved by a federal court, can not be imputed to the

Commissioners. *Milliken v. Bradley*, 418 U.S. 717, 748 (1974).

(7) The Court found that the size of the district is large, referring to the fact that Burke County is a large county geographically containing 832 square miles. 639 F.2d at 1380. The reference to "size" in *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) was clearly directed toward the number of *persons* and *positions*, which cause voter confusion. Burke County had only 18,255 persons according to the 1970 Census. This is less people than are represented by a single member of the Georgia House of Representatives (25,500) and less than one-fourth the average number of persons represented by a State Senator (81,964). As far as the County's geographic size, it is less than a square with 29 miles on each side.

(8) Lastly, while the Court found evidence of past discrimination, none of it related to *voting*, and there was no evidence that discrimination in other areas affected voting.

Therefore, even under the pre-*Bolden Zimmer* analysis, the decision below is erroneous.

(6) The Fifteenth Amendment Does Not Reach A Voting Dilution Case

In *Bolden*, the plurality opinion holds that the Fifteenth Amendment does not apply to a voting dilution case. 64 L.Ed.2d 57. Mr. Justice Blackmun did not address the issue. Mr. Justice Stevens felt that the Fifteenth Amendment does apply, 64 L.Ed.2d at 69, and

Justices Marshall and Brennan seem to agree. The Court of Appeals in this case holds the Fifteenth Amendment to be applicable, 639 F.2d at 1372, as did the panel in *United States v. Uvalde School District*, 625 F.2d 547, 553 (C.A. 5th 1980), whereas a different panel in *McMillan v. Escambia County*, 638 F.2d 1239, 1243 (C.A. 5th 1981), held that it does not apply.

Therefore, this is a substantial question which has not been definitely resolved. Appellants, of course, adopt the view expressed by the plurality opinion in *Bolden*, 64 L.Ed.2d at 57.

(7) The Dilution Doctrine Does Not Apply To County Governing Bodies

Four justices expressed doubt that the dilution doctrine applies to the governing bodies of municipalities and other political subdivisions in *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978). There are clear differences. In state legislative seat cases, most of the districts are almost always single member districts, so when a multimember district is included, the question naturally arises as to why should such districts be different. Also, there are valid reasons why a districtwide allegiance is desirable in a public body having a greater identity of problems, which do not exist when considered as to a state legislature. See Note, 87 Harv. L.R. 1851, 1857 (1974).

Appellants urged this question below, and they urge it now.

(8) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act

In a case attacking a districting device as being unconstitutional, the Court should not itself devise a new plan, but should permit the body an opportunity to devise its own plan and submit it under Section 5 of the Voting Rights Act for preclearance. *Wise v. Lipscomb*, 437 U.S. 535 (1978); *Berry v. Doles*, 438 U.S. 190 (1978); *Sanchez v. McDaniel*, 615 F.2d 1023 (C.A. 5th 1980).

CONCLUSION

County-wide voting has been in effect in Burke County continuously since 1911. The undisputed evidence shows that blacks who are a majority in the County, register, vote and run for office without hindrance. The district court below, which decided the case prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), found that the at large system was neutral when adopted, but that it had been maintained for a racially discriminatory purpose, based entirely on the discriminatory impact criteria formulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973). The Court of Appeals upheld that determination, concluding that this Court's decision in *Mobile v. Bolden* had not really changed the law except to accord the *Zimmer* criteria *inference* rather than *presumption* status; that the district judge below had rightfully forseen this Court's deci-

sion two years before it was rendered, and applied this "inference" test. The decisions below therefore are clearly incorrect, and amount to striking down an election system in effect for 67 years on the basis of evidence which at best only doubtfully shows discriminatory impact and clearly fails to show discriminatory purpose. As thus applied by the Court of Appeals, the *Zimmer* criteria in practice have fulfilled an early prediction that they would become tantamount to a *per se* rule of illegality. See 87 Harv. L.R. 1851, 1859 (1974). The *Zimmer* approach is deficient in methodology. On the one hand, it permits a plaintiff to parade before the Court every minor detail of prior discrimination in the history of the area in the expected hope that the revulsion to this unhappy past will somehow obscure reasoning and evoke a favorable response based on sympathy rather than reason. Second, it involves the Courts in passing on such patently political questions as to whether the legislature has been responsive to minority needs. Courts are hardly appropriate forums to exercise judgment on such questions. The wisdom of legislation has never been considered to be a proper question for judicial determination.

This case was tried in the district court after this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), and after the Court of Appeals' decision in *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978), holding that discriminatory purpose had to be shown in voting dilution cases. Consequently, both parties were well aware that discriminatory purpose was a requirement. Plaintiffs sought to establish its existence by reference sole-

ly to the *Zimmer* criteria. Defendants on the other hand, presented evidence showing valid grounds for the at large plan; that this case was the first effort ever launched to change it; and that its retention was not traceable to a discriminatory purpose. Where, as here, the record on appeal is complete, this Court should reverse and remand for entry of judgment on behalf of defendants. *Boyle v. Wells,* 103 F.2d 237 (C.A. 6th 1939), cert. den. 308 U.S. 579; *Engleman v. Cahn,* 425 F.2d 954 (C.A. 2nd 1969), cert. den. 397 U.S. 1009; *Levin v. Mississippi River Fuel Corp.,* 386 U.S. 162, 170. Where plaintiffs' evidence is insufficient, reversal and remand for entry of judgment for the defendant is proper. *New York, etc., R. Co. v. Henagan,* 364 U.S. 441, 5 L.Ed.2d 183 (1960). In voting dilution cases, the Court of Appeals has not hesitated to remand with directions for judgment to be entered below for a plaintiff. *Wallace v. House,* 538 F.2d 1138 (C.A. 5th 1976). There should not be one rule for plaintiffs and a different one for defendants, for "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection, all classes of men, at all times and under all circumstances." *Ex Parte Milligan,* 4 Wall. 2, 120 (1866). This Court should reverse the judgment below and remand with directions that judgment be entered for defendants. Otherwise, the Court of Appeals, in keeping with its past performance, will simply re-rationalize the *Zimmer* criteria and find some other obscure, esoteric basis of distinction.

Respectfully Submitted,

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APPENDIX A

[1358] 639 Federal Reporter, 2nd Series

Herman LODGE et al.,
Plaintiffs-Appellees,

v.

J. F. BUXTON et al.,
Defendants,

Ray DeLaigle et al.,
Defendants-Appellants.

No. 78-3241.

United States Court of Appeals,
Fifth Circuit.
Unit B

March 20, 1981

[1360] Before JONES, FAY and HENDERSON, Circuit Judges.

FAY, Circuit Judge:

Plaintiff class, consisting of all Black residents of Burke County, Georgia, brought this action to have that county's system of at-large elections declared invalid as violative of the First, Fourteenth and Fifteenth

Amendments to the United States Constitution and Title 42 U.S.C. §§1971 and 1973. The District Court for the Southern District of Georgia held for the plaintiffs, on the grounds that the at-large election process was maintained for the purpose of limiting Black access to the political system in violation of their Fourteenth and Fifteenth Amendment rights. Accordingly, the District Court ordered that the existing system of at-large elections be abandoned and that the county be divided into five districts with each district electing one county commissioner. We affirm the judgment of the District Court in all respects.

FACTS

This case arose in Burke County, a large and predominantly rural county in southern [1361] Georgia. In fact Burke County is the second largest of Georgia's 159 counties in terms of the area it encompasses.[1] Burke is similar to many rural counties in Georgia in that its economic base is predominantly agricultural. The county's population is somewhat over 10,000 people, a slight majority of whom are Black.[2] No Black has ever been elected to the county commission in Burke County.

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1 Burke County is 832 square miles in area, making it approximately the size of two-thirds of the State of Rhode Island.

2 The following population table is taken from the District Court's findings of fact and conclusions of law:

This suit was filed in 1976 by various named plaintiffs as representatives of the class of all Black residents of Burke County.[3] It alleged that the county's system of at-large elections violated plaintiff's First, Fourteenth and Fifteenth Amendment rights, as well as their rights under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, and the Reconstruction Act, 42 U.S.C. §1971, by diluting the significance of the

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YEAR *c	TOTAL POPULATION	PERCENTAGE *b WHITE	PERCENTAGE *a BLACK
1975	10,700	42%	58%
1970	10,988	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	78%
1940	26,520	25%	75%
1930	29,224	22%	78%

*a
Percentage is to the nearest whole percent.

*b
The "percentage white" figure includes a category labelled "foreign born white"; the greatest number in this group was 42, in 1930. After 1930, this statistic apparently was not kept.

*c
The 1975 figures are a mid-census estimate taken from plaintiffs' exhibit 191.

In addition, the record indicates that the disparity in size between the White and Black residents of Burke County has continued to decrease since 1975, so that the current Black majority is very slight.

3 The class was actually certified by Judge Alaimo on May 12, 1977, some eleven months after suit was filed.

Black vote, thereby unconstitutionally restricting their right to meaningful access to and participation in the electoral process.

After a trial, during which both parties offered voluminous evidence in support of their respective positions, the District Court held for plaintiff. The court concluded that the at-large system had been maintained for the purpose of limiting Black participation in the electoral process. The court entered an order, setting forth the findings of fact and conclusions of law, requiring Burke County to elect five county commissioners, one from each of five districts into which the county was to be divided.[4] The court's order of October 26, 1978 was to be effectuated by the time of the general election [1362] on November 8,

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4 The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population	(%)	White Population	(%)	% Deviation
1	3,736	2,899	(77.6)	837	(22.4)	+2.3
2	3,673	2,753	(74.9)	920	(25.1)	+0.5
3	3,595	1,914	(53.2)	1,681	(46.8)	-1.6
4	3,590	1,852	(51.6)	1,738	(48.4)	-1.7
5	3,661	1,570	(42.9)	2,091	(57.1)	+0.3

District	Voting Age Population	Black Voting Age Population	(%)	White Voting Age Population	(%)
1	2,048	1,482	(72.4)	556	(27.6)
2	2,029	1,407	(69.3)	622	(30.7)
3	2,115	978	(46.2)	1,137	(53.8)
4	2,112	947	(44.6)	1,175	(55.4)
5	2,217	803	(36.2)	1,414	(63.8)

1978. The District Court denied defendant's motion for a stay of that order pending the outcome on appeal. On October 27, 1978, this Court also denied defendant's motion for a stay pending appeal. On November 3, 1978, Justice Powell granted defendant's motion for a stay pending final disposition of the appeal by this Court.

ISSUES PRESENTED

Appellant asserts that the District Court erred by applying an incorrect legal standard in assessing appellee's constitutional rights. Appellant contends that the District Court did not and could not find that the at-large electoral system was created or maintained for the purpose of limiting Black participation in that system, as required by the Supreme Court in the recent decision of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Appellant contends that, while the operation of the system may have had the affect of limiting Black participation, the system was not designed or maintained to so operate.

In response, appellee offers various bases for affirming the District Court's judgment. They contend that the trial court correctly found the requisite degree of purposeful or intentional maintenance of a discriminatory system within the meaning of the Supreme Court's decision in *Bolden* and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1972). They assert, alternatively, that inability to meaningfully participate

in the electoral system violates a fundamental liberty interest within the meaning of the First Amendment. They contend that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973 and the Reconstruction Act, 42 U.S.C. §1971(a)(1) proscribe at-large voting systems having a discriminatory effect, without regard to the purpose or intent of that system.

BACKGROUND

We believe this case turns on the interpretation of the proscriptions of the Fourteenth and Fifteenth Amendments. Therefore, we begin with a review of the application of those constitutional principles to voting dilution cases.[5] There are certain truisms that can be set out from the beginning. At-large voting is not *per se* unconstitutional. *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). No group, whether racially or ethnically identifiable has a right to elect representatives proportionate to its voting power in the community. *White v. Regester*, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 2339 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-50, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971). Even consistent defeat at the polls

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5 The Fourteenth Amendment provides in pertinent part, the following: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment provides, in pertinent part, the following: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

by a racial minority does not, in and of itself, give rise to constitutional claims. *Whitcomb*, 403 U.S., at [1363] 152-53, 91 S.Ct. 1874. In order to find a law, racially neutral on its face, unconstitutional, the plaintiff must prove that it was conceived or maintained with the intent or purpose of promoting invidious discrimination. *Id.*, at 149, 91 S.Ct. 1872. As this applies to voting dilution cases such as this, plaintiff must establish that the racially neutral at-large system was created or maintained for the purpose of preventing minority groups from effectively participating in the electoral process.[6]

It is one thing to say that the plaintiff must establish proof that the purpose for creating or maintaining a system was to unconstitutionally restrict the access of a group to the political process, it is quite another to say what evidence will suffice to establish that discriminatory purpose or intent. Cases involving literacy tests or poll taxes, or property ownership requirements are, by comparison, easy to decide. The most obvious purpose for the creation or maintenance of such systems is clearly discrimination.

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6 One of the conceptual reasons for allowing voting dilution cases to be maintained was well expressed by this Court in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). The Court said,

> An invidious at-large scheme merely achieves the same end [as gerrymandering], denial of effective participation, by submerging an interest group in a constituency large enough and polarized enough to place that group in the [electoral] minority consistently.

Id. at 219.

In a voting dilution case in which the challenged system was created at a time when discrimination may or may not have been its purpose,[7] it is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination.[8] Neither the Supreme Court nor this Court, however, has denied relief when the weight of the evidence proved a plan to intentionally discriminate, even when its true purpose was cleverly cloaked in the guise of propriety. The existence of a right to redress does not turn on the degree of subtlety with which a discriminatory plan is effectuated. Circumstantial evidence, of necessity, must suffice, so long as the inference of discriminatory intent is clear.

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7 The general election laws in many jurisdictions were originally adopted at a time when Blacks had not received their franchise. No one disputes that such laws were not adopted to achieve an end, the exclusion of Black voting, that was the status quo. Other states' election laws, though adopted shortly after the enactment of the Fifteenth Amendment, are so old that whatever evidence of discriminatory intent may have existed, has long since disappeared. This case falls within that category. The focus then becomes the existence of a discriminatory purpose for the *maintenance* of such a system.

8 We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate." Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply, there will be no "smoking gun."

The question then becomes, from what type of circumstantial evidence may an inference of intent be drawn, and how much of it is required? The answer to that question may be contained in the Supreme Court's recent decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

Appellant contends that *Bolden* represents a radical shift from and rejection of the law of this Circuit rendered prior to that decision. Appellee, as might be expected, denies that *Bolden* represents any such radical change. We believe it fair to say that *Bolden* contains certain ambiguities,[9] requiring this Court to attempt to construe it in a manner consistent with [1364] other precedents of the Supreme Court, with the expressed and implied intent of that Court and with decisions of this Court. To that end, we will begin with a review of the Supreme Court decisions and decisions of this Court prior to the Supreme Court's ruling in *Bolden*.[10] Next, we will set out in detail the positions taken by the Justices in their various opinions in *Bolden*. At that point we will attempt to reconcile *Bolden* with prior decisions,

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9 *See United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547 (5th Cir., 1980). "The ambiguity of the plurality opinion [in *Bolden, supra*] is alleviated by the various dissents and concurring opinions. . . ." *Uvalde* at 582.

10 We do not attempt herein to provide an exhaustive review of all the decisions of this Court or the Supreme Court that lead up to the current state of the law. For an excellent historical survey, see Judge Tjoflat's opinion for this Court in *Nevett v. Sides, supra*, note 6. Our purpose is simply to state the law prior to *Bolden*, and to determine the impact of that ruling on this case.

and establish a workable rule to follow.[11] Only at that point will we consider the facts of this case and the various legal theories of each party.

THE LAW BEFORE BOLDEN[12]

In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), the Supreme Court held, among other things, that the Equal Protection Clause of the Fourteenth Amendment was not violated, although the challenged multi-member district electoral system used in Marion County, Indiana resulted in the election of disproportionately few of that county's Black ghetto citizens. The Court concluded that the results were an inevitable political reality, because the Blacks, voting solidly as Democrats, were outvoted by the Re-

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11 The rule we establish is for dilution claims brought under the Fourteenth and Fifteenth Amendments. We do not reach appellees First Amendment or statutory bases for affirming the District Court's judgment. With respect to the assertion that section 2 of the Voting Rights Act, 42 U.S.C. §1973, provides a remedy for conduct not covered by the Fifteenth Amendment, we are bound by the expression of five Justices of the Supreme Court (*see* the opinions of Stuart, J. and Marshall, J., *dissenting*) that such is not the case. We do not express any opinion as to the application of the First Amendment or 42 U.S.C. §1971 to this case. We believe such new courses should be charted by the Supreme Court which, as of yet, has not chosen to do so. We believe our restraint in this area is particularly appropriate given the fact that the District Court did not consider those grounds in its evaluation of the case.

12 We refer here to the law prior to the Supreme Court's decision in *Bolden*. Included in this section is an analysis of this Court's decision in *Bolden*.

publicans in most elections. In rejecting plaintiff's claim for relief, however, the Court noted several areas which, if factually proven, could have strengthened plaintiff's case. At one point the Court said,

> But we have deemed the validity of multi-member districts justifiable, recognizing also that they may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' *Fortson*, 779 U.S. at 439 [85 S.Ct. at 501], & *Burns*, 384 U.S. at 88 [86 S.Ct. at 1294]. Such a tendency, we have said, is enhanced when the district is large and elects a substantial portion of the seats in either house of a bicameral legislature, . . . or if it lacks provision for at-large candidates running from particular geographical subdistricts, as in *Fortson*. . . .

403 U.S., at 143-44, 91 S.Ct. at 1869. The Court later went into greater detail, saying, "[b]ut there is no suggestion here that Marion County's multi-member district or similar districts throughout the state, were conceived or operated as purposeful devices to further racial or economic discrimination. . . .

We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party

they desired to support, to participate in its affairs or to be equally represented on those occasions when the legislative candidates were chosen." *Id.* at 149, 91 S.Ct. at 1872.

Two terms after *Whitcomb*, the Supreme Court decided *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1972). In that case the Court affirmed the District [1365] Court's judgment that the multi-member districts in Dallas and Bexar County, Texas unconstitutionally diluted the voting rights of certain racial and ethnic minority groups within those counties. The Court began with the proposition enunciated in *Whitcomb*, that "[t]he plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct. at 2339. The Court held that this standard had been met by plaintiffs in Dallas County, with proof that (1) the history of official racial discrimination affected the rights of Blacks to register, vote, and participate in the political process, (2) the requirements of a majority vote in primary elections coupled with the requirement that candidates run from a "place",[13] though not improper in themselves, en-

13 Running from a "place" is the same as running from a numbered post. A candidate selects the area whose seat he wishes to run for, although he need not live in that area.

hanced the opportunity for racial discrimination, (3) extremely few Blacks had been slated or elected in Dallas County since the days of Reconstruction, (4) the slating organization and its candidates who were elected were unresponsive to the needs and aspirations of the Black population because the Blacks' votes were not needed, and (5) the slating organization recently had relied on racial campaign tactics to defeat those candidates expressing concern for the needs and rights of the Black community.[14] In the case of Bexar County,

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14 With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F.Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith con-

the Court found the requisite exclusion from the political process with the same type, although a lesser quantity, of evidence. The Court based its decision on the finding that (1) there was a long history in Bexar County of invidious discrimination in the fields of "education, employment, economics, health, politics and others," (2) "the typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult . . .," (3) Mexican-Americans were vastly underrepresented in elective positions, (4) Mexican-Americans were hindered in their efforts to register to vote until recently by a restrictive registration procedure and (5) the Bexar County [1366] state legislative delegation was insufficiently responsive to the interests of the Mexican-American community, when considered in the aggregate, supported plaintiff's position that they were effectively removed from the political process in Bexar County.

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cern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." *Id.*, at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

412 U.S., at 766-67, 93 S.Ct. at 2339-40.

Following *White*, this Court decided the case of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) *(en banc), aff'd on other grounds, sub nom., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1975).[15] In *Zimmer*, we held a multi-member system of elections in East Carroll Parish, Louisiana violative of plaintiff's constitutional rights in that it diluted the impact of the votes of minority residents of that community. This Court, taking guidance from the decisions of the Supreme Court in *White v. Regester*, and *Whitcomb v. Chavis*, set out a list of factors that courts should consider in evaluating the constitutional permissibility of voting practices alleged to discriminate against racial minorities. We said,

> . . . where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provisions for at-large candidates running from particu-

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15 The Supreme Court expressly said that it affirmed the judgment "without approval of the constitutional views expressed by the Court of Appeals." 424 U.S., at 638, 96 S.Ct., at 1084.

> lar geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester, supra*, demonstrates, however, that all these factors need not be proved in order to obtain relief.

Zimmer at 1305.[16]

Finding that all the primary factors, except unresponsiveness,[17] were established, and that many of the "enhancing" factors were present, this Court concluded that a constitutional violation had been established.

Five years later, this Court was called on to reconsider its *Zimmer* analysis, in light of the Supreme Court's decisions in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429

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16 In *Zimmer*, the proof of these criteria was an end unto itself. This Court did not make the next inquiry, as is now required, as to the extent to which the proof of those factors would allow an inference of intentional discrimination to be drawn.

17 As will be discussed, *infra*, *Zimmer* was constitutionally infirm to the extent relief was granted without proof of unresponsiveness. We believe this is one of the significant reasons that *Zimmer* was criticized so strongly in *Bolden*.

U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).[18] It did so in a series of cases decided the same day: *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Mobile v. Bolden*, 571 F.2d 238 (5th Cir. 1978), *rev'd.*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980); *Blacks United for Lasting Leadership v. Shreveport*, 571 F.2d 248 (5th Cir. 1978); *Thomasville* [1367] *Branch of the NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978).[19]

In the first case in that series, *Nevett v. Sides, supra*, Judge Tjoflat, writing for this Court, extensively reviewed the status of the law with regard to claims that certain voting practices violate the Fourteenth and Fifteenth Amendment rights of racial minorities. On the basis of *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court con-

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18 These were not voting dilution cases. They simply reaffirmed "the basic equal protection principle that the invidious quality of law [neutral on its face] claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S., at 240, 96 S.Ct., at 2048. The Court indicated its intent to have the rule broadly applied to cases such as this, by referring approvingly to *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), a congressional apportionment case, in which proof of discriminatory purpose was required.

19 We discuss herein only the first two of the four cases. The first case, *Nevett v. Sides*, is important to this analysis because this Court used that case to set forth the principles of law to be applied in all such cases. The second decision, *Mobile v. Bolden*, is significant here because it was the Supreme Court's rejection of our analysis in that case that gives rise to appellant's contention that this Court has been employing an erroneous legal standard.

cluded that such a claim could not to [sic] be established without proof that the allegedly discriminatory system was conceived or maintained for the purpose of restricting the access of minorities to the political process. 571 F.2d at 219-21.[20]

As was the case in decisions discussed previously, the question became what type and how much evidence is required to establish proof of intent. Particularly, the Court was attempting to set forth the evidence that would allow an inference to be drawn that the electoral system was being maintained, rather than implemented, for a discriminatory purpose.[21] After detailed analysis the Court concluded that the presence of the factors set out in *Zimmer could* allow the inference of purposeful discrimination to be drawn. The Court reasoned that if the electoral system was not being maintained for the purpose of achieving the constitutionally proscribed end, i.e., official perpetuation of

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20 So that there can be no doubt that the Court thought purpose or intent to be essential elements of a Fourteenth or Fifteenth Amendment claim, we quote some of the language in that opinion. With respect to a claim founded on the Fourteenth Amendment, the Court said, ". . . we hold that a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim such as the one presented in this case." 571 F.2d at 219. Similarly, the Court said, "A showing of improper motivation or purpose is necessary to establish a valid cause of action under the Fifteenth amendment." *Id.* at 221.

21 There was no contention that the system was created for discriminatory purposes because, at the time of its creation, Blacks had been effectively disenfranchised by an amendment to the Alabama Constitution.

discriminatory distribution of political and economic power, it was highly unlikely that the criteria set out in *Zimmer* could be established. The Court was quick to indicate on the other hand, that the finding of purpose or intent should not be a mathematical process by which the party proving or refuting the greatest number of criteria is declared the winner. We said,

> [t]hat the finder of fact determines the plaintiff has prevailed under one or even several of the *Zimmer* criteria may not establish the existence of intentional discrimination. *See, e.g., McGill v. Gadsden County Commission,* 535 F.2d 277 (5th Cir. 1976). The evidence under the other criteria may weigh so heavily in favor of the defendant that the evidence as a whole will not bear an inference of invidious discrimination. Of course, the plaintiff need not prevail under all of the criteria, *Zimmer,* 485 F.2d at 1305, nor is he limited to them. The task before the fact finder is to determine, under all the relevant facts, in whose favor the "aggregate" of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case. It comprehends "a blend of history and an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise." *White v. Regester,* 412 U.S., at 769-70, 93 S.Ct., at 2341. It is the obligation, therefore, of the finder of fact carefully

> to examine and weigh the competing factors to determine whether the coincidence of those probative of intentional discrimination is sufficient.
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> [1368] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564.

571 F.2d at 224-25.

The Court went to great lengths to explain how each of the *Zimmer* criteria, if established, could be evidence allowing an inference of intent. Of particular significance to our resolution of this case is our discussion of the un-responsiveness factor. The Court said

> Consider a plan neutral in its enactment that is used as a vehicle for intentionally ignoring black interests. The existence of such discrimination presupposes racially polarized voting in the electorate. Polarized or bloc voting, although in itself constitutionally unobjectionable, allows representatives to ignore minority interests without fear of reprisal at the polls. When bloc voting has been demonstrated, a showing under *Zimmer* that the governing body is unresponsive to minor-

> ity needs is strongly corroborative of an electorate's bias. The likelihood of intentional exploitation is "enhanced" by the existence of systemic devices such as a majority vote requirement, an anti-single shot provision, and the lack of a requirement that representatives reside in subdistricts.

571 F.2d at 223.

Having established the standard by which to evaluate evidence of intent, the Court considered the facts of the case then at bar. Finding the factual determinations of the trial court, that plaintiffs had failed to establish evidence of the *Zimmer* criteria, not to be clearly erroneous, this Court affirmed the District Court's judgment for defendants.

Mobile v. Bolden, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) was the second of the four voting dilution cases decided by this Court. In that case, this Court affirmed the District Court's judgment that plaintiff-appellee's Fourteenth and Fifteenth Amendment rights had been violated, and reinstated the District Court's order requiring that city commissioners be elected from single-member districts in the future.

Rather than repeat the lengthy historical analysis by which the Court in *Nevett, supra*, concluded that proof of intentional or purposeful maintenance of a discrimi-

natory system was a requisite to proving a dilution case, the Court simply incorporated by reference that portion of the *Nevett* decision.[22] At only one place in the decision did the Court explicitly refer to the intent requirement. The Court said,

> Under our holding of today in *Nevett II*, these findings also compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 597 (1976), and the fifteenth amendment, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964).

571 F.2d at 245. Despite the brevity of this comment, a careful reading of the decision confirms our conclusion that the Court was following the purpose or intent standard set out in *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*

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22 "We also incorporate the portions of our opinion of today in *Nevett II* [*Nevett v. Sides*] that explicate the legal principles applicable to voting dilution cases." 571 F.2d at 241. We believe the Court's decision to incorporate by reference the legal standard, with respect to the necessity of establishing proof of purpose or intent, may have given rise to the erroneous conclusion that this Court did not recognize the need for such proof in that case. A careful reading of our opinion in *Bolden*, however, leads inextricably to the conclusion that proof of discriminatory intent was required.

In attempting to evaluate the existence of discriminatory intent in the maintenance of a racially neutral electoral system, the [1369] Court was required to consider circumstantial evidence from which an inference of intent could be drawn. Accordingly, the Court applied the *Zimmer* criteria and, holding the District Court's finding of intentional maintenance of a discriminatory system not to be clearly erroneous,[23] entered judgment for the plaintiffs. The remedy afforded, however, was considerably different than in the traditional dilution case. Mobile had operated under a three-person commission form of government. The commission was responsible for all executive and administrative functions of the city. The three commissioners elected one of their members to serve as Mayor. The District Court concluded that the discriminatory system could not be remedied, as in the normal case, by dividing the city into districts along preexisting ward or precinct lines. Accordingly, the District Court ordered the commission form of government abolished and replaced it with a mayor-commission system under which the executive and legislative functions were separated, the former being allocated to the mayor, the latter to the council. Additionally, the District Court changed the commission size from three

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23 In reaching its conclusion, that the electoral system was maintained for discriminatory purposes, the District Court found all of the *Zimmer* criteria present except that going to the weight of the state policy behind at-large elections. With respect to that factor, the District Court concluded that it was neutral.

members to a council with nine members, each member being elected from a single-member district.

BOLDEN

We come now to the Supreme Court's recent decision, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Depending on which party to this litigation one listens to, this decision is either revolutionary, definitive, and absolute or evolutionary, ambiguous, and flexible in its impact on the state of the law. As will be discussed, we do not agree with either of these positions. We do agree, however, that it is a complex ruling; the Court's opinion commanding only a plurality, with a total of six separate opinions being published. In order to shed the most light on the implications of the decision, we will begin by reviewing the positions taken by the Justices in their separate opinions.

(a) *The Plurality*—Justice Stewart, writing for the plurality,[24] begins with an analysis of this Court's opinions with respect to the Fifteenth Amendment. He details the case law development of the Fifteenth Amendment and concludes, as did this Court, that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." 100 S.Ct. at 1497. The plurality then

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24 Justice Stewart was joined in the opinion by Chief Justice Burger, Justice Powell, and Justice Rehnquist.

concludes that only purposeful conduct which *directly* interferes with the rights of Blacks to register or vote is proscribed by the Fifteenth Amendment.[25] The Court said, "That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.' Having found that Negroes in Mobile, 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." 100 S.Ct., at 1499.

The plurality next focused its attention on this Court's conclusion that Mobile's electoral system violated plaintiff-appellee's Fourteenth Amendment equal protection rights. The opinion begins with the proposition taken from *Whitcomb v. Chavis*, and [1370] *White v. Regester*, and adhered to by this Court in its opinion in *Bolden*, 571 F.2d 238 (5th Cir. 1980), that to prove a constitutional violation in a dilution case "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. (citations omitted). A plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful device to further racial discrimination.' " 100 S.Ct., at 1499.

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25 This restrictive view of the role of the Fifteenth Amendment in cases such as this did not command a majority of the Court. In fact, five Justices explicitly stated that, with the proper proof, the Fifteenth Amendment would support a voting dilution claim.

Looking at the record in the case at bar the Court held, ". . . it is clear that the evidence in the present case fell far short of showing that the appellants 'conceived or operated [a] purposeful device to further racial discrimination.' (citation omitted)." 100 S.Ct., at 1502. The Court compared *White v. Regester*, the "only [ ] case [ ] in which the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group." 100 S.Ct. at 1500, with the facts of the case before it. Though recognizing that courts attempting to evaluate the constitutionality of racially neutral legislation ". . . must look to other evidence to support a finding of discriminatory purpose." 100 S.Ct. at 1501, the Court held that "[t]he so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." 100 S.Ct., at 1503. The plurality was of the opinion that, while "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," 100 S.Ct., at 1503, neither the quality nor the quantity of the evidence presented supported a finding of purposeful conduct.

(b) *Justice Blackmun's concurrence*

In the first of two concurring opinions, Justice Blackmun states that he is joining in the result reached by the plurality "because I believe the relief afforded appellees by the District Court was not commensurate

with the sound exercise of judicial discretion." 100 S.Ct., at 1507. Justice Blackmun was unable to accept the District Court's decision to force Mobile to abandon its seventy year old commission form of government for a mayor-council system, without first attempting to fashion a remedy that would be compatible with the existing system. Justice Blackmun said, ". . . I do not believe that, in order to remedy the unconstitutional vote dilution [ ] found, it was necessary to convert Mobile's city government to a mayor-council system. In my view, the District Court at least should have maintained some of the basic elements of the commission system Mobile long ago had selected — joint exercise of legislative and executive power, and citywide representation." 100 S.Ct., at 1508.

Despite his concurrence in the result, Justice Blackmun was clear in his view that he agreed with Justice White's dissent as to the substantive questions of constitutional law presented. At the outset of his opinion, Justice Blackmun said, "Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with Mr. Justice White that, in this case, 'the findings of the District Court amply support an inference of purposeful discrimination, *post*, at 1518." 100 S.Ct., at 1507. It is particularly significant that Justice Blackmun agreed with that portion of Justice White's dissent that said the District Court was correct as to its determination that both the Fourteenth and Fifteenth Amendments had been violated.

(c) *Justice Stevens' concurrence*

Though Justice Stevens concurred in the result, he would have the Court apply a test which appears diametrically opposite that employed by the plurality. He said,

> In my view, the proper standard is suggested by three characteristics of the gerrymander [1371] condemned in *Gomillion:*[26] (1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. *These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decision maker.* (emphasis added)

100 S.Ct., at 1512. Justice Stevens then goes on to say that, not only does he reject the purpose or intent test of the plurality, but also that ". . . I am persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or in-

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26 *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

vidious factors have played some part in its enactment or retention." *Id.*

Though it is clear that Justice Stevens rejects the plurality opinion in all respects other than the result achieved, his opinion leaves this and other courts in a somewhat precarious position as to the rule to be applied in future cases. For example, it is unclear what standard Justice Stevens would apply were he to attempt to find the purposeful or intentional conduct that five other Justices would require. In that regard, he rejects the *Zimmer* criteria, not because they are inappropriate when attempting to draw an inference of intent, but rather because he is not concerned with such proof of subjective intent. It is entirely possible, and in fact likely, that he would employ the *Zimmer* criteria were he required to evaluate the existence of discriminatory intent.[27]

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27 Justice Stevens said,

". . . a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. (citation omitted). In this case, if the commission form of government in Mobile were extraordinary, or if it were no more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it."

446 U.S., at 86, 100 S.Ct., at 1512. Justice Stevens looks only to the effects of an electoral system. The *Zimmer* approach looks at those

(d) *Justice White's dissent*

Justice White would reach a result different than that reached by the plurality, although apparently agreeing that purposeful discrimination is a necesary element of a Fourteenth or Fifteenth Amendment dilution claim. His position is quite simply that *Bolden* is controlled by *White v. Regester*, and that the plurality incorrectly applied the rule established in that case, that courts should consider the totality of historical, cultural, and socio-economic factors in evaluating the existence of a purposefully discriminatory electoral system. He begins by demonstrating how the factors considered in *White* were similar, if not identical, to those which the District Court and Court of Appeals applied in finding for the plaintiffs in *Bolden*. He then points out that the District Court and Court of Appeals, addressing "the effect of *Washington v. Davis*, (citations omitted), on the *White v. Regester* standards. . . . concluded that the requirement that a facially neutral statute involved purposeful discrimination before a violation of the Equal Protection Clause can be established was not inconsistent with *White v. Regester* in light of the recognition in *Washington v. Davis* that the discriminatory [1372] purpose may often be inferred from the totality of the relevant facts. . . ." 100 S.Ct., at 1516. Justice White

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same effects, but only to the extent that they allow an inference of intent. It is reasonable to assume, therefore, that, were he required to draw an inference of intent, Justice Stevens would employ the same factors that he thinks are relevant independent of the intent inquiry.

thought this approach to be consistent with that of the Court in *Washington v. Davis*, in which it said, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S., at 242, 96 S.Ct., at 2408-49. Ultimately, Justice White concludes that the plurality opinion is simply inconsistent with those of the Court in *White, Whitcomb, Village of Arlington Heights*, and *Washington*, although it expresses an intent to affirm the positions taken in and be consistent with those decisions.

(e) *Justice Brennan's dissent*

Justice Brennan's position is concise and unequivocal. He agrees with Justice Marshall "that proof of discriminatory impact is sufficient in these cases." 100 S.Ct., at 1520. He also states that ". . . even accepting the plurality's premise that discriminatory purpose must be shown, I agree with Mr. Justice Marshall and Mr. Justice White that appellees have clearly met that burden." *Id.*

(f) *Justice Marshall's dissent*

Justice Marshall's analysis was substantively similar to the bifurcated position of Justice Brennan, although he went into far greater depth to explain the jurisprudential underpinning of his opinion. We do not here review Justice Marshall's exposition as to why proof of

intent is unnecesary in cases such as this. This is not because his opinion is lacking in philosophical appeal, but rather because, given the opinions of at least six members of the Court, it is quite clearly not the law by which the present case must be governed. With respect to the question of the proof necessary to establish the requisite intent to discriminate, Justice Marshall would impose a substantially different burden of proof on the plaintiffs than would the plurality. Justice Marshall rejects the plurality's position that the plaintiff must prove that "the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Rather, Justice Marshall "would apply the common-law foreseeability presumption" 100 S.Ct., at 1538, to cases such as this. Applying his standard, "[t]he defendants would carry their burden of proof only if they showed that they considered submergence of the Negro vote a detriment, not a benefit, of the multi-member systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons." *Id.*

RECONCILING BOLDEN

There are certain principles that can be stated definitively after *Bolden*. A plaintiff bringing a voting dilution case attacking an electoral system that is racially

neutral on its face, may challenge such system on the grounds that it violates either the Fourteenth or Fifteenth Amendment. Though the plurality would limit the scope of the Fifteenth Amendment to those situations in which there was official action directly impinging the rights of Blacks to register or vote, that position did not command a majority. Three dissenting Justices specifically said the parameters of the Fifteenth Amendment encompasses voting dilution cases in which it is asserted that the system purposefully limits the access of Blacks to the political process. In his concurrence, Justice Blackmun agrees with the position taken by Justice White in his dissent, as to the substantive questions presented, and thereby becomes the fourth member of the Court to approve an expansive reading of the Fifteenth Amendment. In his concurrence, Justice Stevens explicitly states, ". . . I disagree with Mr. Justice Stewart's conclusion for the plurality [1373] that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar."[28] 100 S.Ct., at 1509 n. 3. He also said, ". . . I am satisfied that such a structure [at-large systems] may be challenged under the Fifteenth Amendment as well as under the Equal Protection Clause of the Fourteenth Amend-

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28 In that same footnote, Justice Stevens points out that it is ". . . difficult to understand why, given this position [that the Fifteenth Amendment is inapplicable to cases such as the one at-bar], he [Justice Stewart] reaches out to decide that discriminatory purpose must be demonstrated in a proper Fifteenth Amendment case." 100 S.Ct., at 1509, n. 3.

ment. . . ." 100 S.Ct., at 1509. We conclude, therefore, that five Justices believe the Fifteenth Amendment creates a right of action in voting dilution cases.

An even less disputable principle, after *Bolden*, is that a plaintiff challenging an at-large voting system must prove that the system was created or maintained for the purpose of limiting the access of or excluding Blacks from effective participation in that system.

The question we return to is what type and how much evidence is required to establish proof of a discriminatory purpose. It seems to us that there are three possibilities.

The first possibility is that *Bolden* requires direct evidence of intent. We think this is incorrect. Not only does the plurality opinion say that the circumstantial evidence in *Zimmer* "may afford some evidence of a discriminatory purpose" 100 S.Ct., at 1503, common sense tells us that in a case such as this, in which it can not be asserted that the system was created for discriminatory purposes, it is likely that no plaintiff could ever find direct evidence that the system was maintained for discriminatory purposes. Clearly, the right to relief cannot depend on whether or not public officials have created inculpatory documents.[29] We must reject this first possibility.

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29 *See* note 8, *supra* and accompanying text.

The second possibility is that, while circumstantial evidence may suffice, the type of circumstantial evidence called for in *Zimmer* is inadequate to prove discriminatory purpose. We think this is the elusive area post-*Bolden*. Though four Justices were satisfied with the *Zimmer* criteria,[30] five Justices clearly rejected the *exclusive* use of those criteria as the means of inferring purpose or intent.[31] We conclude that they rejected the use of the *Zimmer* criteria to the extent that this Court, in *Bolden, presumed* the existence of a discriminatory purpose from the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. Additionally, we think the Supreme Court was directing all courts making the inquiry to apply the *Zimmer* criteria only to the extent that they are relevant to the factual context at hand and, to the extent they are not so relevant, to employ other criteria. Finally, it appears that the Supreme Court has somewhat increased the burden of proof on plaintiffs in such cases. In *Zimmer*, this Court granted relief despite the factual conclusion that the police juries and

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30 Justice Blackmun agreed with the three dissenting Justices that the evidence adduced at trial was sufficient to prove discriminatory intent.

31 The plurality was joined in this position by Justice Stevens. It is essential to understand, however, that he rejects the use of the *Zimmer* criteria to draw an inference of intent, not because he believes such proof cannot establish discriminatory intent, but rather because he thinks the question of intent is irrelevant to the disposition of cases such as this.

school board in question were not unresponsive to the needs of the Black community. The Supreme Court implicitly concluded in *Bolden*, as we explicitly do today, that absent such proof of unresponsiveness a *prima facie* case can not be [1374] established. *Zimmer* has been rejected to the extent it holds otherwise. Thus, we make one exception to our earlier statement that proof of the *Zimmer* criteria is required only to the extent that they are relevant to the facts of a particular case. We believe, however, that this exception is well grounded in the conceptual framework that recognizes the Constitutional rights here involved. As has been stated before, the Fourteenth and Fifteenth Amendments protect the right to effective participation in the electoral process. Effective participation does not mean the right to have members of one's race, sex, or group elected to political office. What it does mean is that the system of government that serves the interests of the people must serve the interests of all the people; at least to the extent that one group's interests are not invidiously discriminated against. Therefore, a racially definable group may challenge an electoral system on dilution grounds only if it can be shown that the system invidiously operates to the detriment of their interests. Unresponsiveness is a necessary element to plaintiff's maintenance of an action such as this. Proof of unresponsiveness, alone, does not give rise to an inference that the system is maintained for discriminatory purposes. That conclusion must be reached only in light of the totality of the circumstances presented.

Appellant contends that, in light of *Bolden*, the use of the *Zimmer* criteria to draw an inference of intent is erroneous. Such a broad absolute reading of *Bolden* seems unwarranted and incorrect.[32] In *Bolden*, the Supreme Court specifically refers with approval to its decisions in *White v. Regester* and *Whitcomb v. Chavis*. The Court points out that, in *White*

> the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests of the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. 412 U.S. at 768, 93 S.Ct. at 2340-41 (footnote omitted).

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32 *See United States v. Uvalde Consolidated Independent School District, supra*, note 9, in which this Court said, "We are convinced that the fundamental reasoning of our decision in *Bolden*, and its companion, *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), survives the Supreme Court's decision [in *Bolden*] intact." *Uvalde* at 582.

100 S.Ct., at 1501. Moreover, it is clear that the *Zimmer* criteria were gleaned from the Supreme Court's guidance in *White* and *Whitcomb*.[33] Finally, the plurality itself recognized that "the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose. . . ." In our opinion, therefore, the use of the *Zimmer* criteria is sound to the extent that the inquiry focuses on the primary question of *discriminatory purpose*.

The third possible explanation for the Supreme Court's decision in *Bolden* is simply that the evidence adduced was insufficient to allow an inference of discriminatory purpose. We believe this was the most significant factor behind the Court's [1375] ruling.[34] After indicating that the factors enunciated in *Zimmer* could be indicative though not conclusive of discriminatory purpose, the Court said, "[t]he so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to

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33 In his dissenting opinion in *Bolden*, Justice White points out that ". . . *Zimmer* articulated the very factors deemed relevant by *White v. Regester* and *Whitcomb v. Chavis* — a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, the lack of any provision for at-large candidates to run from particular geographical subdistricts.
100 S.Ct., at 1518.

34 In *Uvalde*, *supra* note 9, Judge Rubin points out that ". . . the plurality's rejection of the fifteenth amendment and section 2 claims in *Bolden* may rest entirely upon the conclusion that no discriminatory motivation was shown." *Uvalde* at 582.

prove an unconstitutionally discriminatory purpose *in the present case.*" (emphasis added) 100 S.Ct., at 1503. The fact that such a weighing of the evidence was difficult and extremely close is reflected by the division of the Court.

THE RULE ESTABLISHED

A cause of action under the Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through the maintenance of an at-large electoral system is legally cognizable only if the allegedly injured group establishes that such system was created or maintained for *discriminatory purposes.* A discriminatory purpose may be inferred from the totality of circumstantial evidence. An essential element of a *prima facie* case is proof of unresponsiveness by the public body in question to the group claiming injury. Proof of unresponsiveness, alone, does not establish a *prima facie* case sufficient to shift the burden of proof to the party defending the constitutionality of the system; responsiveness is a determinative factor only in its absence. The *Zimmer* criteria may be indicative but not dispositive on the question of intent. Those factors are relevant only to the extent that they allow the trial court to draw an inference of intent. The *Zimmer* criteria are not the exclusive indicia of discriminatory purpose and, to the extent they are not factually relevant in a given case, they may be replaced or supplemented by more

meaningful factors.[35] Even if all of the *Zimmer* and other factors are established, an inference of discriminatory purpose is not *necessarily* to be drawn. The trial court must consider the totality of the circumstances and ultimately rule on the precise issue of discriminatory purpose. Finally, given the reality that each case represents an extremely unique factual context for decision, this Court will give great deference to the judgment of the trial court, which is in a far better position to evaluate the local political, social, and economic realities than is this Court.

THE PRESENT CASE

The complaint in this action was originally filed in April, 1976. District Judge Alaimo's final order, including findings of fact and conclusions of law, was entered over two and one-half years later. The length of the pendency of the case was largely attributable to the extensive discovery conducted by both parties. At the conclusion of the non-jury trial, Judge Alaimo held for the plaintiff class, concluding that Burke County's system of electing county commissioners on an at-large basis had been maintained for the purpose of limiting the access of that county's Black residents to the electoral process.

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35 As we have indicated, the unresponsiveness criteria may not be replaced. Proof of unresponsiveness is an essential element to the maintenance of a claim such as this. It should be supplemented, of course, with such other criteria as may be relevant to the analysis of a given case.

Much ado has been made by appellants in this action about the fact that the District Court's order preceded the Supreme Court's decision in *Mobile v. Bolden.* Though this could make a difference in some cases, we do not find such timing controlling here. As we indicated earlier, the "new rule" established in *Bolden* appears to be an expansion of the principles earlier established in *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* A court that correctly anticipated how the intent requirement in [1376] those cases would be applied to voting dilution cases, as in *Bolden,* could correctly interpret and apply the law, without the benefit of the Supreme Court's recent opinion. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case. At the outset of his order, Judge Alaimo refers to this Court's treatment of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* in *Nevett v. Sides,* 571 F.2d 209, 221 (5th Cir. 1978), *cert. denied,* 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980), and concludes that '. . . [a] demonstration of intention is necessary under both fourteenth and fifteenth amendments,' as a requisite to a finding of unconstitutional vote dilution. *Herman Lodge v. Buxton,* No. 78-3241, Findings of Fact and Conclusions of Law at 4 (S.D. Ga., Oct. 26, 1978) (hereinafter *Order*). It is clear, therefore, that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case. We cannot affirm his judgment, however, unless and until we conclude that his analysis satisfies the rule we have established today.

To begin with, we note that the District Court's order was not defective for exclusive and unwarranted reliance on the *Zimmer* criteria. Though the court did consider those criteria it also evaluated the case in light of "other factors" set out by this Court in *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) *(en banc), cert. denied*, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). In its order the District Court said, "It must be remembered that the Court is not limited in its determination to the *Zimmer* factors, rather the Court may consider the *Zimmer* factors, 'or similar ones.' *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d at 143. One 'similar factor' considered in *Kirksey* which did not seem to be an explicit primary factor in the *Zimmer* formula, is a depressed socio-economic status, 'which makes participation in community processes difficult.' *Id.*[36] This is an important factor and must be considered here." *Order* at 6. On the basis of these statements, as well as the District Court's detailed analysis of the *Kirksey* factors, we conclude that the District Court did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent.

The next step in our analysis is to determine whether the District Court properly made a finding of un-

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36 We think the District Court's consideration of this factor, in addition to those established in *Zimmer*, is particularly significant given how important the presence of a depressed socio-economic condition was to the Supreme Court's determination in *White v. Regester* that the at-large electoral system in Bexar County, Texas violated plaintiffs' Fourteenth Amendment rights.

responsiveness. As we indicated earlier, failure to find unresponsiveness precludes the maintenance of a voting dilution case. For the reasons set out below, we conclude that the District Court's finding of unresponsiveness was quite correct in the present case.

After considering exhaustive evidence on the subject, the Court found that the county commissioners demonstrated their unresponsiveness to the particularized needs of the Black community by: (1) allowing some Blacks to continue to be educated in largely segregated and clearly inferior schools; (2) failing to hire more than a token number of Blacks for county jobs, and paying those Blacks hired lower salaries than their White counterparts; (3) appointing extremely few Blacks to the numerous boards and committees that oversee the execution of the county government, particularly those groups, such as the committee overseeing the Department of Family and Childrens Services, whose function is to monitor agencies of the county government that work primarily with Blacks; (4) failing to appoint any Blacks to the judge selection committee, with respect to the appointment of a Judge for the Burke County Small Claims Court, despite the fact that most of the defendants in that court are Black; (5) making road [1377] paving decisions in a manner so as to ignore the legitimate interests of the county's Black residents;[37] (6) forcing Black residents to take legal

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37 As a typical example of the lack of concern that White county commissioners have for the interest of Burke's Black residents, the District Court pointed to the facts that

action to protect their rights to integrated schools and grand juries, and to register and vote without interference;[38] and (7) participating in the formation of, and in fact contributing public funds to the operation of, a pri-

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(1) The Mamie Jo Rhodes Subdivision, inhabited by Blacks is unpaved. It is directly across from a subdivision inhabited by Whites. The latter has paved roads. (2) Millers Pond Road is paved up to the pond, used by Whites; but from that point the road is unpaved, although that portion is inhabited by Blacks. (3) Paving on Hatchett Road ends at the residence of a White; yet Blacks live on the remainder of the unpaved road. (4) The streets of Alexander are paved in the section of town inhabited by Whites; but the roads in the black section are not paved. And (5) county road 284 is paved to the point where the last white lives, but beyond, where the road is inhabited by Blacks, the road is unpaved. It is of interest to note that the road to the dog trial field is paved even though trials are held but once a year. By contrast, there is still an unpaved road to a school. Although the last unpaved road to a white school was paved in 1930, it seems as if the road to the Palmer Elementary School, formerly an all-black school, and still predominately black, remains unpaved.

Order at 13-14. Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke County in every interaction they have with the White controlled bureaucracy.

38 Of particular significance, given the plurality position in *Bolden* that a Fifteenth Amendment violation occurs only when there is proof that the right to register and vote was *directly* impinged, is the District Court's finding that such overt conduct was taking place even at the time the present lawsuit was filed. The court said

> The county did, indeed, establish additional registration sites. But only after a pre-trial conference before and "friendly persuasion" by this Court. The defendants'

vate school established to circumvent the requirements of integration. We hold, not only was the District Court's finding of unresponsiveness not clearly erroneous, but that the county commissioners, acting in their official capacity, have demonstrated such insensitivity to the legitimate rights of the county's Black residents that it can only be explained as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination. To find otherwise would be to fly in the fact of overwhelming and shocking evidence.

A second factor going to the question of discriminatory intent is the extent to which historical discrimination impacts on a minority group's *present* opportunity for effective participation in the electoral process.[39] On the basis of substantial evidence, the District Court

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tepidity was further demonstrated by the fact that a period of four months was required to get the registration cards to the new sites; and that the new sites were operative only a short while before the registration period ended. Admittedly, the County Commissioners recently approved a transportation system that should help solve access problems for some; but only after being prodded by the prosecution of this lawsuit. The Commissioners' sluggishness in this respect is another example of their unresponsiveness to the black members of the community.

Order at 14-15.

39 The focus of the District Court properly was on the *present* effects of discrimination. As the Supreme Court said in *Bolden*, ". . . past discrimination cannot, in the manner of original sin, condemn government action that is not in itself unlawful." 100 S.Ct., at 1503.

concluded that previous acts of official discrimination had a significant negative impact on the opportunity of Blacks in Burke County to exercise their right to so participate. We agree.

The District Court began by assessing the present impact on voter registration of the prior absence of Black suffrage. The Court said that until 1965, when the Voting Rights Act was adopted, Black suffrage was "virtually non-existent." At present, Black voter registration is approximately [1378] 38% of those eligible.[40] On that basis, the Court thought it reasonable to infer that "[t]he marked increase in the registration of Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date." *Order* at 7.

The Court considered next the fact of past and present bloc voting as it impacts the present ability of Blacks to participate in the electoral system. The evidence of such bloc voting was clear and overwhelming.[41] Of par-

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40 There was some conflict in the evidence as to the percentage of eligible Blacks who were registered to vote. Defendants asserted that the correct figure was 44%, while plaintiffs asserted that it was 38%. The District Court resolved the issue for plaintiffs, but indicated that either figure supported the conclusion it reached.

41 Of course, bloc voting is not illegal. Nonetheless, the Supreme Court and this Court have repeatedly recognized that voting along racial lines enhances the likelihood that those seeking to manipulate the electoral system for discriminatory purposes will succeed. It is for that reason that the inquiry into voting

ticular significance was the fact that in the one city election in which city councilmen were elected from single-member districts,[42] a Black was elected.

Inadequate and unequal educational opportunities, both in the past and present, as the result of official discriminatory acts, was another consideration important to the court. The evidence was clear that the relative percentage of Blacks who had attended high school, finished high school, or attended college was substantially less than the White residents of Burke County. On the basis of that evidence, as well as expert testimony, the Court concluded that ". . . one reason Blacks, as a group, have been ineffective in the political process, is the fact that they have completed less formal education." *Order* at 9.

Further evidence of the effective preclusion from participation in the electoral process, based on official conduct, was found in the past and present operation of the county's Democratic primary system and in the Georgia law making it more difficult for Blacks to serve as chief registrar in a county. The history of the Democratic Party Primary ranges from the "white primary",

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patterns is relevant. Like unresponsiveness, it is a factor of greater significance in its absence. A plaintiff would be hard pressed to prove that a system was being maintained for invidious purposes, without proof of bloc voting.

42 The election was from single-members districts, rather than at-large, pursuant to a court order. *See Sullivan v. DeLoach*, Civ. No. 176-238 (S.D. Ga., Sept. 11, 1977).

struck down in 1946, *Chapman v. King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946), to the present twenty-four member Burke County Democratic Executive Committee, of whom only one is Black. The present lack of participation was found to be the direct result of historical discrimination. Equally significant evidence of official present discrimination was found in Ga. Code Ann. §34-605, which states in pertinent part, "[n]o person shall be eligible to serve as chief registrar unless such person owns interest in real property. . . ." Given the testimony that significantly fewer Blacks than Whites are freeholders, the Court concluded that the statute operated to restrict Black participation in the electoral process.

On the basis of the evidence set out herein, as well as that of official discrimination in employment, paving, etc., as discussed earlier, the District Court concluded that the effect of historical discrimination was to restrict the opportunity of Blacks to participate in the electoral process in the present. That finding is not clearly erroneous, and, as with the unresponsiveness factor, we completely agree.

The third factor considered by the District Court was depressed socio-economic participation in the electoral process. The evidence on this point was both clear and disconcerting. Blacks suffer at the poverty level to a far greater proportionate degree [1379] than the White residents of Burke County. Over one-half of the

Black residents have incomes equaling three-fourths, or less, of a poverty level income. Seventy-three percent of all Black households lacked some, or all, plumbing facilities, as opposed to sixteen percent of the White households. Blacks in Burke County tend to be employed to a far greater degree in menial positions and, to the extent they have non-menial occupations, they are compensated at a level below their White counterparts. Finally, the court considered the blatantly inferior quality and quantity of education received by Blacks from the past to the present. On the basis of this evidence the Court concluded that Blacks in Burke County suffered from severe socio-economic depression, that such depression was caused, at least in part, by past discrimination, and that such depression has a direct negative impact on the opportunity for Blacks to effectively participate in the electoral process. That finding is not clearly erroneous.

The next factor considered by the District Court was lack of access to the political process.[43] On the basis of (1) the inability of Blacks to participate in the operation of the local Democratic party, and the effects thereof, (2) the County Commissioners' failure to appoint Blacks to local governmental committees, in meaningful numbers, and (3) the social reality that person-to-person relations, necessary to effective cam-

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43 The District Court considered evidence of actions by public officials and actions by private individuals or groups that could be manipulated by public officials to perpetuate a system whose purpose was the exclusion of Blacks.

paigning in a rural county, was virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks, the District Court concluded that historical and present discrimination operated in conjunction with the officially sanctioned electoral system to unfairly limit the access of Blacks to the political process. That finding is not clearly erroneous. Of particular significance to the District Court and to this Court is the manner in which the local Democratic party is operated, and the effects thereof. As the District Court correctly pointed out, "[e]lection in the [Democratic] primary is 'tantamount' to election to the office." *Order* at 19. Moreover, the local Democratic Executive Committee is empowered by state law to provide poll watchers, *Ga. Code Ann.* §34-1310(b), poll officers, *Ga. Code Ann.*, §34-501, and substituted nomination, *Ga. Code Ann.* §34A-903. The committee also elects delegates to be sent to the various political conventions. We think it clear that the ability to operate successfully in the framework of the existing Democratic party structure is one of the keys to electoral victory. Given the fact that only one of the committee's twenty-four members is Black, it becomes painfully clear that the existing electoral system could be purposefully used in conjunction with what must be viewed as the political reality in Burke County to continue the official and unofficial policy of excluding Blacks from participation in that system.

The last of the so-called primary factors considered by the District Court was the state policy behind the at-large election system. The Court stated that

> while [the policy is] neutral in origin, *it has been subverted to invidious purposes.* (emphasis added). Since it is a statute of local application, its enactment, maintenance or alteration is determined by the desire of representatives in the state legislature of the county affected. Burke's representatives have always been Whites. Accordingly, they have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.

Order at 22. We hold that this finding of the District Court, based as it must be on his unique opportunity to assess the local political and social environment, is not clearly erroneous.

In addition to the primary criteria, the District Court considered a number of factors [1380] which this Court, as well as the Supreme Court, have indicated enhance the opportunity to use an electoral system for invidious purposes. The first factor is that the size of the questioned district is large. In that regard, the District Court pointed to the fact that "Burke County is nearly two-thirds the size of Rhode Island, comprising an area of approximately 832 square miles." *Order* at 22. The Court goes on to say that it "finds as a matter of law, that the size of the county tends to impair the access of Blacks in Burke County to the political process." *Id.* at 23. This being a conclusion of law, we are not restricted by a clearly erroneous standard.

Nonetheless, our independent analysis of this factor leads us to agree with the District Court's conclusion.

The second enhancing factor considered by the District Court was the majority vote requirement. The Court points out that, by the terms of the statute, "county commissioners are to run at-large, that the victor must be elected by a majority vote, *Ga. Code Ann.* §34-1513, and that candidates run for specific seats. *Ga. Code Ann.* §34-1015." *Order* at 23. The Court also noted that, though there is no anti-single shot provision, the requirement that candidates run for numbered posts has potential effects that are equally adverse. The District Court concluded that the presence of these factors enhanced the likelihood that the electoral system could be used for discriminatory purposes. This conclusion is sound and well supported.

The final factor considered by the District Court is the presence or absence of a residency requirement. Burke County has no residency requirement, despite the fact that candidates must run for numbered posts. As the District Court said, "[a]ll candidates could reside in Waynesboro, or in "lilly-white" neighborhoods. To that extend, the denial of access becomes enhanced." *Order* at 24.

Having concluded that all the relevant primary and enhancing factors were established in plaintiff's favor, the only question that remains is whether the District Court properly could have drawn an inference therefrom that the at-large electoral system in Burke

County has been maintained for the purpose of restricting the access of the county's Black residents to that system. As we indicated earlier, the trial court is to make its conclusion on the basis of the totality of the circumstances, not merely by measuring which party proved the presence of absence of the greatest number of factors. In making his judgment, Judge Alaimo did not have the benefit of the Supreme Court's decision in *Mobile v. Bolden*, nor, obviously, of our discussion of that case here. Nonetheless, a careful reading of Judge Alaimo's order leads us inescapably to the conclusion that he made the type of independent inquiry into the intent that we have said is necessary. Moreover, his order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the county's Black residents to meaningfully participate therein. At one point, for example, Judge Alaimo makes the unequivocal statement that, "[m]oreover, it is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (emphasis in original) *Order* at 7.

Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact virtually man-

dated by the overwhelming proof. We affirm the District Court's judgment.[44]

THE RELIEF GRANTED

The District Court ordered that the five county commissioners for Burke County [1381] be elected from single-member districts in all future elections. The Court adopted the original plan submitted by the plaintiff, because it had substantially smaller population deviations among the districts than the plan submitted by the defendants. Such relief was proper.

At the outset, we note, as did the District Court, that there were no "special circumstances" that would justify an exception to the general rule that at-large districts are not favored.[45] Moreover, this is not a case like

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22 One question left unresolved by the various opinions in *Bolden* is whether the plaintiff must demonstrate that the system was maintained "because of not merely in spite of" its adverse effects, or simply establish that the adverse effects were the foreseeable consequences of maintaining the system. The plurality would require the former, whereas Justice Marshall, in dissent, indicated that the latter would suffice. We conclude that Judge Alaimo's order would satisfy either standard and, therefore, we specifically do not attempt to resolve that dispute. Moreover, we have a difficult time understanding the substance of the conflict. It seems to us that if a plaintiff establishes that a system was maintained for discriminatory purposes, he had *a fortiori* proven that it was maintained "because of" its discriminatory effects.

45 "We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts

Mobile v. Bolden, in which an entire form of government was abandoned without consideration of the valid local interests in the maintenance of the existing system. In this case, unlike *Bolden*, the Court's order does not affect the existing allocation of executive and administrative responsibilities among the Burke County commissioners. Nor does the relief ordered require any other alteration in the operation of that governmental unit. In fact, the Court's order does not even change the number of county commissioners that are to be elected. This is another factor that distinguishes the remedy in *Bolden* from that ordered here.

We conclude that the remedy ordered is not only permitted, but, under the facts presented, it may be required. The picture that plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. The discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy.[46] While this Court is aware of its in-

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are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan v. Howell*, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed. 320." *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465."
100 S.Ct., at 1499.

46 The problems of Blacks in Burke County should not be viewed in a vacuum. The present treatment of Blacks in the South is directly traceable to their historical positions as slaves. While many individual political leaders have attempted to bring meaningful reforms to fruition, it is equally true that the White com-

ability to alter private conduct, we are equally aware of our duty to prevent public officials from manipulating that conduct within the context of public elections for constitutionally proscribed purposes. For all the reasons set forth herein, the judgment of the District Court is AFFIRMED.

HENDERSON, Circuit Judge, dissenting:

Although I can appreciate the monumental task of the district court in its articulation of findings of fact and conclusions of law, I am of the opinion that this case should be remanded for reconsideration in light of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

The constitutionality of the at-large voting system for county commissioners in Burke County, Georgia, has not been tested by the *Mobile* criteria. The majority opinion [1382] recognizes that the district court's decision was made without the guidance of *Mobile*, but it states that the inquiry into discriminatory intent

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munities, for the most part, have fought the implementation of programs aimed at integration with every device available. A District Court ordering relief in a case such as this must take cognizance of that fact. As a learned member of this Court recently recognized, ". . . if we, as judges, have learned anything from *Brown v. Board of Education*, it is that prohibitory relief alone affords but hollow protection from continuing abuse by recalcitrant governments. Facing this situation, judges have the option of either declaring that litigants have rights without remedies, or fashioning relief to fit the case." F. Johnson, *In Defense of Judicial Activism*, 28 *Emory L.J.* 901, 910 (1979).

actually undertaken by the trial court satisfies that standard.

Mobile does more than reaffirm the necessity for a showing of discriminatory intent, however. *Mobile* also abolishes the simple "aggregate of factors" approach of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) aff'd. sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 196 (1976), heretofore followed in this circuit. In its place, *Mobile* institutes a "totality of the circumstances" test in which the *Zimmer* factors still possess relevance but to varying degrees. Thus, past official discrimination is not to be treated as an "original sin" and unresponsiveness by elected officials is "relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices." *City of Mobile v. Bolden*, 100 S.Ct. at 1503, 64 L.Ed.2d at 63.

Zimmer was not the sole measure by which the findings of fact of the district court were tailored. That order was gauged by a hybrid standard referred to as the *Zimmer-Kirksey* test. *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977) instructs that depressed socio-economic status which hinders participation in community affairs signals a denial of access to the political process. *Kirksey v. Board of Supervisors*, 554 F.2d at 143. In the findings of fact of the district judge, depressed socio-economic status was accorded consideration equal to that given the *Zimmer* factors. Yet, the *Mobile*

plurality considers historical and social factors, apart from the discrimination generated by official state action, to be "gauzy sociological considerations [which] have no constitutional basis." *City of Mobile v. Bolden*, 100 S.Ct. at 1504 n. 22, 64 L.Ed.2d at 64 n. 22.

Mr. Justice Stevens joined the *Mobile* plurality decision to retain Mobile's commission form of government as constitutionally permissible. I find two policy considerations raised in his concurrence to be persuasive. Each notion counsels the judiciary to exercise restraint in voting dilution cases. First, at-large systems will always disadvantage one or more minority groups struggling for political power. Yet, the essence of democracy is majority rule and a voting structure must be judged by a standard that "allows the political process to function effectively." *City of Mobile v. Bolden*, 100 S.Ct. at 1509, 64 L.Ed.2d at 70. Second, the standard chosen cannot hold reprehensible all detrimental effects on an identifiable political group because such a test would invite a host of voting dilution cases sure to plunge the judiciary into a "voracious political thicket." *City of Mobile v. Bolden*, 100 S.Ct. at 1514, 64 L.Ed.2d at 75. Reading Mr. Justice Stevens' concurrence together with the plurality opinion leads me to conclude that before a court may intrude into local political processes, it must possess stronger evidence of invidious motivation than past social discrimination and economic deprivation.

An exposition of evidence more detailed than that made by the district judge in the *Mobile* case is seldom seen. *Bolden v. City of Mobile*, 422 F.Supp. 384 (S.D. Ala. 1976). Most of the evidence here is of a similar character. Yet in the eyes of the Supreme Court, the findings set forth in *Mobile* were insufficient to prove unconstitutional voting dilution because the data was not viewed in the proper perspective. The conclusions drawn from the evidence gathered below may suffer from the same infirmity. As I read *Mobile*, it demands emphasis on evidence of official state denial of equal participation in the slating and election process and eschews heavy reliance on socio-economic data. A remand for reassessment of the record evidence, together with additional evidence, if necessary, seems to be the appropriate course of action. For these reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 78-3241

HERMAN LODGE, ET AL.,
Plaintiffs-Appellees,

versus

J. F. BUXTON, ET AL.,
Defendants,

RAY DeLAIGLE, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING

(APRIL 8, 1981)

Before JONES, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby granted as to the typographical errors.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

HERMAN LODGE, SHELLY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY, and LEVI CRAWFORD, individually and on behalf of all those similarly situated,

Plaintiffs,

versus C.A. No. 176-55

J. F. BUXTON, QUINTON ROGERS, ROY MARCHMAN and RAY HARPER, individually and as members of the Board of Commissioners of Roads and

Revenues for Burke County, and their successors in office; A. HOLLAND GNANN, OTTO B. JOHNSON, and WALL T. THOMPSON, Individually and in their official capacities as members of the Board of Elections for Burke County, Georgia, and RAY DeLAIGLE, Individually and in his official capacity as a member of the Board of Commissioners of Burke County,

Defendants.

Filed: September 29, 1978

ORDER

Following a bench trial lasting several days in this voting dilution case, the Court has come to the conclusion:

1. that the plaintiffs are entitled to prevail,

2. that the present members of the Board of Commissioners for Burke County have been elected in an unconstitutional election and shall be replaced by new commissioners elected in accordance with the election provided herein,

3. that Burke County shall be divided into five districts, in accordance with the map designed as Plaintiffs' Exhibit No. 300,

4. that the duly qualified voters of each such district shall elect one of its residents otherwise qualified

by Georgia law who may or may not be freeholders of such district as one of the County Commissioners of Burke County for the five-member commission,

5. that defendants shall open and accept qualifications for candidates for said positions commencing immediately and until 12:00 o'clock noon, October 16, 1978, (the qualifying fee shall be the same as otherwise provided by Georgia law in special elections for such position), and

6. that the election for said new commissioners shall be held at the same time as the General Election to be held in 1978 for the election of the Governor of the State and the members of the United States Congress from Georgia.

The individuals elected as Commissioners of Burke County pursuant to this Order shall serve for a period of two years, after which their successors shall be elected in 1980 for four-year terms, as otherwise provided by law.

This Order will presently be supplemented and supported by the entry of appropriate findings of fact and conclusions of law. The Court, because of other pressing business, has been unable to place its findings and conclusions in proper final form. Accordingly, the Court deemed it imperative to enter the instant Order so that the maximum amount of time could be accord-

ed the candidates to prepare for the election ordered herein.

The parties are directed to cooperate in technical aspects of holding said election so as to eliminate any unnecessary problems therein.

So Ordered, this 29th day of September, 1978.

/s/ ANTHONY A. ALAIMO
Chief Judge,
United States District Court,
Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

(Number and Title Omitted)

Filed: October 26, 1978

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This action for declaratory judgment was tried by the Court without a jury. The named plaintiffs and other

black residents[1] of Burke County, Georgia brought this action to challenge the existing method of selecting their five county commissioners,[2] charging the method

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1 This action was certified as a class action by the Court's Order of May 12, 1977. The certified class consists "of all black citizens of Burke County, Georgia."

2 The Board of Commissioners of Burke County, as presently constituted, derives from Georgia Laws of 1911, p. 390. According to Section 1 of that Act, the Board of Commissioners of Roads and Revenues for Burke County consisted of five persons elected by the qualified voters of the county, all to be elected at the same time. Candidates were required to be resident freeholders of the county for at least three years prior to the election and, in addition, had to attain at least 28 years of age and be eligible to election as a member of the General Assembly of the State.

The 1911 law was amended in 1929 by Georgia Laws of 1929, p. 548, to provide that the members of the County Commission be appointed by the Grand Jury of Burke County.

This law was in turn amended by Georgia Laws of 1931, p. 400, providing again that the county commissioners be elected by the qualified voters of the County. That Act requires that any candidate be a resident freeholder of the county for at least three years prior to election, and that property ownership requirement has been continued in the law to this date.

All five county commissioners in Burke County are elected at the same time and for terms of four years, so that there are County Commission elections only once every four years.

A majority vote is required for the nomination and election of any county commissioner, and county commissioners must run, both in primary and general elections for specific numbered posts. Neither of these practices was implemented in Burke County until they were imposed by general state law in 1964. *Ga. Code Ann.* §§34-1015 and 1513. (Defendants' Answer, ¶ 9).

The next regularly scheduled election for county commissioners in Burke County is November, 1980, with primaries to be held several months prior thereto.

No residency requirements, or subdistrict requirement exists for the election of individuals to the Burke County Commission.

unlawfully diluted the strength of their votes. Plaintiffs pray that the County be divided into single-member districts in order to eliminate the conditions producing the unlawful dilution. For the reasons that are set out below, the Court finds for the plaintiffs.

According to plaintiffs, Blacks are not and cannot be elected to the County Commission, or generally to other elected positions, because the "at-large" system in use minimizes and dilutes black voting strength. No Black has ever been elected to the County Commission, in spite of the fact that historically Burke County has more Blacks than Whites.[3] However, as defendants are quick to point out,

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3 The following is the population and percentage of population by race in Burke County between 1930 and 1970 according to plaintiffs' exhibits 59, 108, 109, 110, and 191, of which the Court takes judicial notice:

YEAR [*c]	TOTAL POPULATION	PERCENTAGE [*a] WHITE [*b]	BLACK
1975	10,700	42%	58%
1970	10,988	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	78%
1940	26,520	25%	75%
1930	29,224	22%	78%

[*a] Percentage is to the nearest whole percent.

[*b] The "percentage white" figure includes a category labelled "foreign born white"; the greatest number in this group was 42, in 1930. After 1930, this statistic apparently was not kept.

[*c] The 1975 figures are a mid-census estimate taken from plaintiffs' exhibit 191.

> "[t]he Constitution does not demand that each cognizeable element of a constituency elect representatives in proportion to its voting strength. Even consistent defeat of a group's candidates, standing alone, does not cross constitutional bounds." (Citations omitted).

Nevett v. Sides, 571 F.2d 209, 216 (5th Cir. 1978) (hereinafter *Nevett II*). It is the plaintiffs' burden to go beneath the surface and show the Court, regardless of form, an unlawful voting dilution of constitutional dimensions "[b]y producing evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question. . . ." *Id.*

Plaintiffs' complaint alleges that the present method of nominating and electing the Board of Commissioners of Roads and Revenues for Burke County, including the use of numbered posts, majority vote, run-offs and elections at-large,[4] dilutes the relative strength of their vote in violation of the rights guaranteed them by the first, thirteenth, fourteenth, and fifteenth amendments of the Constitution. Plaintiffs also claim that Burke County's election system violated 42 U.S.C. §§1971, 1973, and 1983.

Although plaintiffs assert a statutory theory of relief, the Court does not reach the issues raised by this

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4 Of course, multi-member districts, or county-wide elections systems are not *per se* unconstitutional. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

theory, only recently discussed in special concurrence by Judge Wisdom, in *Nevett II*, 571 F.2d at 231. Since the Fifth Circuit has not addressed this theory in an operative context, and since plaintiffs have presented a strong case with respect to the fourteenth and fifteenth amendments, the Court follows the test enunciated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *en banc, aff'd sub nom.; East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) and *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) *(en banc), cert. denied*, 46 U.S.L.W. 3354 (1977); recently described in *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 953-54 (5th Cir. 1978), as a "multi-step inquiry."

Before describing and undertaking the "multi-step inquiry," the Court notes that the Fifth Circuit Court of Appeals recently decided in *Nevett II* that ". . . [a demonstration of intention] . . . is necessary under both fourteenth and fifteenth amendments," as a requisite to a finding of unconstitutional vote dilution, *Nevett II*, 571 F.2d at 221. Functionally, this added requirement has not changed the district court's task since "a finding of racially discriminatory dilution under the *Zimmer* criteria raises an inference of intent and, therefore, . . . a finding under the criteria satisfies the intent requirement. . . ." *Nevett II*, 571 F.2d at 217.

As stated above, "*Zimmer* and *Kirksey* have established a multi-step inquiry for determining whether a districting plan [or election system] unlawfully dilutes a

minority's participation in the political process. The testing seeks to determine whether the plan either is a racially motivated gerrymander or perpetuates an existent denial of access to the political process." *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 953 (S.D. Miss. 1978). There is no question of a racial gerrymander involved here; rather, the question is whether the system perpetuates an existent denial of access to the political process. This question requires "that the court first investigate whether the minority community is presently denied access to the political process. *Zimmer* enumerates several tests to guide this investigation." *United States v. Board of Supervisors of Forrest County*, 571 F.2d at 953.

> "The court in *Zimmer* established two categories [of factors], one containing criteria going primarily to the issue of denial of access or dilution, the other containing inquiries as to the existence of certain structural voting devices that may enhance the underlying dilution. The 'primary' factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the 'particularized interests' of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The 'enhancing' factors include: the size of the district; the portion of the vote

> necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must vote; and whether candidates must reside in subdistricts."

Nevett II, 571 F.2d at 217.

It must be remembered that the Court is not limited in its determination only to the *Zimmer* factors, rather the Court may consider the *Zimmer* factors, "or similar ones." *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d at 143. One "similar factor" considered in *Kirksey* which did not seem to be an explicit primary factor in the *Zimmer* formula, is a depressed socio-economic status, "which makes participation in community processes difficult." *Id.* This is an important factor and it must be considered here.

Finally, in order to succeed, plaintiffs need not demonstrate the existence of each of the primary factors, rather

> "[b]y proof of an aggregation of at least some of these factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access."

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 143 (S.D. Miss., 1977).

The Court will discuss the primary factors in Part I, enhancing factors in Part II, conclusion in Part III, and relief in Part IV.

I.

A.
HISTORY OF PAST DISCRIMINATION

The history of past discrimination is included as a factor in the dilution equation because the legacy of past discrimination may preclude a minority group's effective participation in the political process. The Court finds plaintiffs have produced sufficient evidence of past discrimination to demonstrate that they have been unfairly denied such effective participation. Moreover, it is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes. *Compare Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978).

The first fact which plaintiffs have established demonstrating this element of the *Zimmer-Kirksey* recipe is a link between past discrimination and low black voter registration. Before enactment of the 1965 Voting Rights Act, Black suffrage in Burke County was virtually non-existent. As of December 19, 1962 only 427, or 6.5% of the eligible Blacks were even registered.[5]

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5 Plaintiffs' Request of Judicial Notice filed February 16, 1977, Exhibit "E".

Following the Act's passage and by August 31, 1967, Black voter registration increased to 2,760 or 41.8% of the eligible Blacks. Today, approximately 38% of the eligible Blacks are registered to vote in Burke County.[6] The marked increase in the registration of Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date.

There was a clear evidence of bloc voting the only time Blacks ran for County Commissioner. Obviously, this must be ascribed in part to past discrimination. There are three Militia Districts in which Blacks are in a clear majority, the 66th, 72nd and 74th.[7] In a fourth

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6 Plaintiffs claim the respective percentages of registered eligible voters are 38% Black and 62% White, while defendants claim there are 44% Black and 56% White. Either set of figures supports the Court's conclusion. Although there was some dispute about these figures, neither party challenged the 1970 census report on which the County Commission Election District Plan selected by the Court is based.

7 The Court finds the following to be a reasonably accurate estimate of the registered voters by race in each district, as of 1978.

Precinct	Black	White	Total
Waynesboro - 60-62 District	1,050	2,149	3,199
Munnerlyn - 61st District	44	50	94
Alexander - 63rd District	75	104	179
Sardis - 64th District	211	478	689
Keysville - 65th District	163	214	377
Shell Bluff - 66th District	167	82	249
Greenscutt - 67th District	49	215	264
Girard - 68th District	110	195	305
St. Clair - 69th District	29	26	55

district, the 69th, as of 1978, there were only a few more Blacks than Whites. One black candidate, Mr. Childers, won in the four black districts, losing in all of the others. The other black candidate, Mr. Reynolds, won in three of the black districts losing in all of the others.[8]

Similarly, in 1970 Dr. John Palmer, a white physician from Waynesboro, who opened the first integrated waiting room in Burke County, ran for County Commissioner. Generally, he was thought of as being sympathetic to black political interests. He was soundly defeated.

In the recent city council election in Waynesboro, the county seat, a Black was elected to the council for the first time in history. This event can be attributed to the high degree of bloc voting, and to the fact that the elected Black ran in a district with a high percentage of black residents.[9]

Precinct	Black	White	Total
Vidette - 71st District	52	112	164
Gough - 72d District	201	68	269
Midville - 73rd District	184	195	379
Scotts Store - 74th District	98	52	150
Total	2,433	3,940	6,373

8 Plaintiffs' Request for Admissions, filed June 5, 1978, Exhibits I-3 and I-4.

9 This was possible because this Court created single-member districts. *See Sullivan v. DeLoach*, Civil No. 176-238 (S.D. Ga.) Order entered September 11, 1977.

Past discrimination in education has also precluded effective black political participation. Burke County schools discriminated against Blacks as recently as 1968. *Bennet v. Evans,* Civil No. 1369 (S.D. Ga.), Order entered June 20, 1969. Plaintiffs' Exhibit 59. And there are still schools like Gough Elementary and Girard Elementary that remain essentially segregated. Plaintiffs' Exhibit 233. Moreover, the Court finds that, as a group, Burke County Blacks have completed less formal education than Whites. Of the 4,476 black inhabitants of the County over 25 years of age, 346 (7.7%) never attended high school, 247 (5.5%) finished high school, and 123 (2.7%) finished college; while of the 4,281 white residents of the same age, 83 (1.9%) never attended school, 661 (15.2%) finished high school, and 308 (7.1%) finished college.[10] Based on the testimony of experts, one reason Blacks, as a group, have been ineffective in the political process, is the fact that they have completed less formal education. The Court concludes that this condition is a direct result of the history of invidious discrimination in Burke County.

Past discrimination has also directly chilled the opportunity for Blacks' becoming involved in the Democratic Party Primary. The Court notes it was not until 1946 that the "white primary" was struck down in *Chapman v. King,* 154 F.2d 460 (5th Cir.), *cert. denied,* 327 U.S. 800 (1946). The Court also finds past discrimina-

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10 Plaintiffs' Supplementary Answer to Defendants' First Interrogatories, filed March 2, 1977, Exhibit "A".

tion has kept Blacks from becoming members of the Burke County Democratic Executive Committee. It was not until after this lawsuit was filed that the Executive Committee, which conducts the only party primary in the county, gained a Black as one of its twenty-four members.

The Court finds evidence of present discrimination unfairly precluding Blacks from effective political participation in the requirements established by *Ga. Code Ann.* §34-605, which states in pertinent part that "[n]o person shall be eligible to serve as chief registrar unless such person owns interest in real property. . . ." A reference to Plaintiffs' Exhibits 66-69 makes it readily apparent that significantly fewer Blacks than Whites are freeholders. The Court finds this is in part due to past discrimination, thus buttressing the Court's conclusion that Blacks are being unfairly precluded from participating in the political process.

Moreover, Burke County Blacks were compelled to turn to this Court to eliminate the existing racially discriminatory system of selecting Grand Jurors. *See Sapp v. Rowland,* Civil No. 176-94 (S.D. Ga.) Order entered May 20, 1977.

Without specifically reiterating the statistics on hiring, the Court finds that as a result of the lingering effects of past discrimination, the County's hiring pattern has been carried out in a manner detrimental to the black community, particularly when one compares

the number of Blacks hired to the number of Whites, or the salaries and positions they respectively hold.[11] The Court also notes that many of the Blacks employed by the county are not in fact paid by the county, but from federal fundings.

The Court finds that the effects of past discrimination has been a direct influence on the County Commissioners' failure to appoint more Blacks to the various committees and boards which oversee, or direct the execution of the county government. Without enumerating such committees and boards and the related statistics, the Court points to one symbolic example of the Commissioners' attitude in this respect. In appointing persons to serve on the Bi-Centennial Committee, the Commissioners appointed fourteen Whites and one Black.[12]

The Court also takes notice of Georgia laws demonstrating a discriminatory intent.[13] *See generally* Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1, for a history of racial discrimination in Georgia.

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11 Plaintiffs' Request for Admissions, filed June 5, 1978, Exhibit I-1. Defendants' Answers to Plaintiffs' First Interrogatories filed June 14, 1976, Exhibit "C".

12 Defendants' Answers to Plaintiffs' First Interrogatories, filed June 14, 1976.

13 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1.

The Court also finds discrimination present in the form of a segregated laundromat's being operated within a few blocks of the county courthouse.[14]

The Court concludes, based on the evidence discussed above, plaintiffs have demonstrated ample evidence of present effects of past discrimination for the purpose of establishing this element of the *Zimmer-Kirksey* test.

B.
UNRESPONSIVENESS OF ELECTED OFFICIALS

Unresponsiveness to the needs of Burke County Blacks "may be proved by present evidence and by lingering effects of past discrimination." *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 954-55 n. 6 (5th Cir. 1978) (*quoting from Kirksey*, 554 F.2d at 144-45).

While the County Commissioners have taken advantage of most federally funded programs which were designed to meet the needs of the disenfranchised, the Court finds the County Commissioners, as an elected body, have acted with an insensitivity to the particularized needs of the black community amounting to unresponsiveness. For instance, "lingering effects of past discrimination" still haunt the county courthouse; there is a "Nigger-hook" at the water fountain, and the

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14 Testimony of Ms. Sullivan and Plaintiffs' Exhibits 239-42.

toilet signs for "Coloreds" and "Whites" still appear through faded paint.

One of the important functions of the County Commissioners is to appoint people to the various boards and committees which oversee execution of the county government. *See* Section A above. Although Blacks may not be entitled to be represented on the boards or committees in proportion to their frequency in the general population, the rare appointment of Blacks amounts to nothing more than a token afterthought, or simply to meet federal guidelines. It is the Court's impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The Commissioners have been singularly unresponsive to this need. This is particularly evident when one considers the racially unbalanced committee appointments. It is highlighted by the fact that Blacks are just beginning to break into the ranks of committees whose function is to oversee agencies of the county government that work principally with Blacks. As an example, it was not until recently that a Black was appointed to the committee overseeing the Department of Family and Children Services. The Commissioners' continued failure to view problems with racial impartiality as well as their unresponsiveness is shown by the procedures used to select the Judge for the Burke County Small Claims Court. That court was created at the request of the small, local merchants, the majority of whom are

White, to collect unpaid consumer debts. The judge selection process is of note here in that the Commissioners selected a committee to pick the Judge. However, they failed to appoint anyone to the committee who could fairly consider potential interests of defendants, most of whom are Black. The Court finds that much in the same manner that the Commissioners have been unresponsive in committee appointments, they have also been unresponsive in their hiring policies. Although the Commissioners do not hire everyone who works for the county, their policy sets the tenor for the county's hiring. As noted above in Section A, most Blacks hold lower paying jobs, and from the testimony, it appeared that the majority of Blacks employed by the county were paid with federal money, whereas white employees were usually paid from county funds.

The Commissioners have also shown unresponsiveness in the paving of county roads. Although the evidence in this regard was not presented with precision or complete clarity, the Court finds that the Commissioners' paving decisions have exhibited a racially discriminatory pattern, thus demonstrating unresponsiveness.[15] In particular, the Court notes the following: (1) The Mamie Jo Rhodes Subdivision, inhabited by Blacks, is unpaved. It is directly across from a subdivision inhabited by Whites. The latter has paved roads.

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15 In the main, for its conclusion on this point, the Court relies on the testimony of Messrs. Harvey, Hopper, Kitchens, Lodge, and Smith, in conjunction with Plaintiffs' Exhibit 279.

(2) Millers Pond Road is paved up to the pond, used by Whites; but from that point the road is unpaved, although that portion is inhabited by Blacks. (3) Paving on Hatchett Road ends at the residence of a White; yet Blacks live on the remainder of the unpaved road. (4) The streets of Alexander are paved in the section of town inhabited by Whites; but the roads in the black section are not paved. And (5) county road 284 is paved to the point where the last white lives, but beyond, where the road is inhabited by Blacks, the road is unpaved. It is of interest to note that the road to the dog trial field[16] is paved even though trials are held but once a year. By contrast, there is still an unpaved road to a school. Although the last unpaved road to a white school was paved in 1930, it seems as if the road to the Palmer Elementary School, formerly an all-black school, and still predominately black, remains unpaved. While the defendants point out instances where Whites were living on unpaved roads, and that they had recently paved "Lodge Circle" of primary benefit to one of the named plaintiffs, the Court finds plaintiffs have adequately demonstrated defendants' unresponsiveness in the form of their paving decisions.[17]

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16 Burke County is famous as a center for bird dog field trials.

17 There was also testimony about "political roads," *i.e.*, pork-barrel projects whereby the local state representative could bequeath a road to a political friend. According to defendants' testimony, the County Commissioners had little control over these roads. However, the Court still finds such "political roads" indicative of Blacks' lack of access to the system, since no witness could remember a Black who had been blessed with such a road.

The Court finds that once Blacks have made their needs known, the sluggishness, or bureaucratic "run-a-round" to which they repeatedly have been subjected amounts to unresponsiveness. As a result, Blacks have been forced outside the local government for relief. They went to the courts to seek school and Grand Jury integration (*see* Section A above), and to the streets to "agitate," as defendants have said, to get lighting at the Davis Park ball field. Outside pressure had to come to bear before the county budged.

The county did, indeed, establish additional registration sites. But only after a pre-trial conference before and "friendly persuasion" by this Court. The defendants' tepidity was further demonstrated by the fact that a period of four months was required to get the registration cards to the new sites; and that the new sites were operative only a short while before the registration period ended. Admittedly, the County Commissioners recently approved a transportation system that should help solve access problems for some; but only after being prodded by the prosecution of this lawsuit. The Commissioners' sluggishness in this respect is another example of their unresponsiveness to the black members of the community.

Another area in which the defendants have exhibited unresponsiveness has been in public education. This manifested itself in the form of conflicts of interest, if not outright breaches of the public trust. There was evidence that in the early sixties, when desegregation

of public schools was beginning to become an inevitable reality, the County Commissioners showed their colors by being among the incorporators of the all-white Edmund Burke Academy. There is more. The Commissioners then donated public funds to buy band uniforms for the private school's band, despite advice to the contrary by the county attorney.

The Court finds, based primarily on the defendants' continued failure to make Blacks a viable part of the county government, that the Commissioners, as a result of the lingering effects of past discrimination, have been unresponsive to plaintiffs' needs. The Court finds this factor must be included as part of the aggregate of factors to be considered in determining the existence of vote dilution.

The Court concludes that the insensitivity of defendants to the needs of the plaintiff class exists because of invidious racial motivations.

C.
DEPRESSED SOCIO-ECONOMIC STATUS

One of the factors the *Kirksey* court identified as being indicative of denial of access to political process is "a depressed socio-economic status." *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 143 (5th Cir. 1977).

The socio-economic status of Blacks in Burke County is clearly depressed.[18] According to Plaintiffs' Exhibits 66 and 67, of the 1,731 families in Burke County with incomes below the poverty level, 1,467 were Black and 274 were White. Given that Blacks are 60% of the population, there are approximately 25% more Blacks whose income is at a poverty level than should be expected. The picture looks even worse when one notices that nearly 53% of black families had incomes three-fourths, or less, of a poverty level income. The Court finds this is in part caused by past discrimination.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court stressed that the plainfiffs' lack of resources was one of the primary reasons for its holding. Admittedly, Goldberg was not a voting rights case, but the same careful consideration must be given by this Court to the factor of income because to more than half of the plaintiffs, the "need to concentrate upon finding the means for daily sustenance, in turn, adversely affects [their] ability to seek redress from . . . [the local]

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18 It appears that Burke County must be an undesirable place for Blacks considering the steady decrease in the county's black population. Between 1930 and 1970, Burke County's black population has decreased from 78% to 58% of the total population. Moreover, 99% of Burke County's Blacks were born in Georgia, while 24% of Burke County's Whites were born out of state. This exodus is probably tied, in part, to past discrimination, and present economic inequality between the races. Plaintiffs' Exhibits 59, 108, 109, 110, and 191.

bureaucracy." *Goldberg, supra* at 264.[19] To this end, the opportunity to cast an undiluted vote becomes indispensable. Accordingly, the Court is constrained to find, within the context of the *Zimmer-Kirksey* aggregate test, that the economic plight of a substantial majority of plaintiffs is tied to past discrimination, and is indicative of their lack of access to the political process. *See also Lubin v. Panish*, 415 U.S. 709 (1974).

In addition to a depressed economic status, Blacks in Burke County are subject to a depressed social status. Although there is no single indicia which the social scientists have identified as determinative of social status, some of the factors identified are present here. The first index to which the Court turns is education. Education, or the lack thereof, is an indicator of social status, and according to the experts, would influence the likelihood of a minority group's effective participation in the political process. Objective statistics show that Blacks have completed less formal education than Whites.[20] It appears without serious dispute that what education Blacks did receive was qualitatively inferior to a marked degree. Per capita spending for the education of black students was much less than for their white counterpart.[21] The Court finds that the un-

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19 The verity of this statement was supported by the testimony of both experts.

20 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed March 2, 1977, Exhibit "A".

21 Plaintiffs' Exhibit 278.

broken history of an inferior formal education has had and does now have a strong tendency to preclude Blacks' effective participation in the political process.

There is additional evidence which illustrates the fact that Blacks in Burke County have a depressed socio-economic status. When one examines Plaintiffs' Exhibits 64 and 65, he learns that Blacks tend to receive less pay for similar work, and that Blacks tend to have the more menial jobs. Housing for Blacks also tends to be inferior, according to Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Exhibit A. This exhibit depicts that 73% of the houses occupied by Blacks lacked some, or all, plumbing facilities, while only 16% of the houses occupied by Whites suffered the same shortcomings.

The Court must conclude that, unfortunately, Blacks in Burke County suffer a depressed socio-economic status due in part to the lingering effects of past discrimination.

D.
LACK OF ACCESS TO THE POLITICAL PROCESS

The political process, in a voting dilution context, has received both a literal and a broad interpretation. It not only has been interpreted to mean physical access to the voting and election processes, *i.e.*, "access of the individual to the ballot box or voting booth . . ." but also to include ". . . whether a group has input into the poli-

tical decision-making process . . . ." *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 143 n. 10. The Court finds that in the past, as well as in the present, plaintiffs have been denied equal access to the political process.

Prior to the passage of the Voting Rights Acts of 1965, Blacks in Georgia were unfairly denied access to the election processes by such devices as literacy tests, poll taxes, and white primaries.[22] Plaintiffs tried to demonstrate that the Georgia "purge law" (*Ga. Code Ann.* §34-624), was such a device,[23] and presently works an unfair denial of access on plaintiffs. The Court finds plaintiffs have failed to prove this theory for their failure to demonstrate adequately that more Blacks than Whites are purged; or that a two-year period is unduly restrictive towards Blacks. The Court makes this finding even though plaintiffs have successfully shown that Blacks, by virtue of their relatively severe degree of poverty, the size of the county (Part II, Section A below), and the absence of a public transportation system, are more likely than Whites to have a problem physically getting to the polling places where they may exercise their most fundamental of rights.

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22 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1.

23 The 1976 Georgia Constitution still demands a literacy and "good character and understanding" test as a requisite for voting, although this provision is suspended by the 1965 Voting Rights Act.

Although plaintiffs here were unable to show a denial of access to specific voting processes, similar to the obviously eggregious denials in *Kirksey, i.e.*, disqualification of certain black candidates by the county election commission, or a conditioning of primary participation upon a pledge of party loyalty, the Court finds a denial of access, in part, caused by the lingering effects of past discrimination, in the virtual absence of Blacks on the Democratic Executive Committee. Defendants attempted to refute a potential finding of this nature by minimizing the role played by the Democratic Executive Committee in Burke County politics. Defendants pointed out that primary slating is open, and that the Executive Committee has never actively supported a candidate. These facts, however, must be viewed in a proper context rather than in a vacuum. The context demonstrates that by state law, the committee may provide poll officers, *Ga. Code. Ann* §34-501; poll watchers, *Ga. Code Ann.* §34-1310(b); and, substituted nominations, *Ga. Code Ann.* §34A-903. Election in the primary is "tantamount" to election to the office. The Executive Committee elects and sends representatives to the various political conventions. The Court concludes, therefore, contrary to defendants' urgings, that the Democratic Executive Committee does indeed play an important, albeit subtle, part in Burke County politics.

In addition to the tasks listed above, the Executive Committee is required by its national and state char-

ters to "insure full participation by all segments of society."[24] The lingering effects of past discrimination are highlighted by the fact that in spite of these affirmative action requirements, when the Committee recently designed a sub-district election scheme for the election of its twenty-four members, no Blacks were asked for their input to the plan.[25] The Court finds the lingering effects of past discrimination to be an important cause of a virtual "lilly-white" Democratic Executive Committee. This fact must be added into the sum producing the unfair exclusion of Blacks from the political process.

The Court also finds that the effects of past discrimination exclude Blacks from the personal contact politics of Burke County. Many of defendants' witnesses testified that success in Burke County politics is based on the number of friends one has. Defendants' witnesses stated this was the case because Burke County has a small population, so that most of its inhabitants know each other on a personal level. As a result there is little need for debate at election time for

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24 Article 9, Section 3, of Georgia Democratic Party State Charter. Plaintiffs' Exhibit 225.

25 It is more than interesting to note that the former and present commission members testified that the political division caused by a single-member district plan would create an unworkable County Commission. Yet, Mr. Thompson, himself, a former Commissioner and Chairman of the Democratic Executive Committee, admitted that even though the Executive Committee members were now elected by districts, this new system had not impaired the functioning of the Committee.

the Whites who have for centuries dominated the public scene. As is further evidenced by testimony of these witnesses, if the voter personally knows the candidate, he or she knows the candidate's political stance. When this factor is combined with the virtual segregation of all social, religious, and business organizations excepting that the only significant black-white relationships are on an employee-employer basis,[26] the result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county.[27] This is not to say, however, that it is the Court's opinion that meaningful political dialogue, which fosters responsive action, cannot develop between an employee and employer. Rather, the Court notes and finds that the combination of factors discussed above, all of which seem to be related to past discrimination, operate unfairly to exclude Blacks from the normal course of personal contact politics in Burke County.

As a final factor to be considered in the Blacks' lack of meaningful input into the political process, the Court finds, as discussed above in Section B, that the Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a meaningful fashion, is without doubt an unfair denial of access of input into the political process.

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26 Based on testimony and Plaintiffs' Exhibits 59-69, and in particular Exhibit 53.

27 This is especially true for poorer Blacks living in the more isolated areas of this large county.

While the denials of access in this case have not been especially blatant, the Court finds in the circumstances of this rural, tightly-knit, racially-separate society, that such denials, subtle though they may be, have operated unfairly to keep Blacks from meaningful political input.

E.
STATE POLICY BEHIND THE AT-LARGE ELECTION SYSTEM

The Court adopts the reasoning of Chief Judge Edenfield in *Pitts v. Busbee, Governor*, 395 F.Supp. 35, 39 (N.D. Ga. 1975), *remanded on other grounds*, 536 F.2d 56 (5th Cir. 1976), with respect to the finding that this factor is neutral.

But while neutral in origin, it has been subverted to invidious purposes. Since it is a statute of local application, its enactment, maintenance or alteration is determined by the desires of representatives in the state legislature of the county affected. Burke's representatives have always been Whites. Accordingly, they have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.

II.
THE ENHANCING FACTORS

It appears that the "enhancing" factors have become part of the dilution "equation" for at least two reasons.

First, their existence is relatively easy to determine and, second, their effect on a minority group, though somewhat limited in comparison to the "primary" factors, is obvious.

As mentioned earlier, the *Zimmer* "enhancing" factors are: the size of the district; the portion of the vote necessary for election (majority or plurality); the number of candidates for which an elector must vote, where the positions are not contested individually; and whether candidates must reside in subdistricts. *Nevett II*, 571 F.2d at 217.

A.
DISTRICT SIZE

Burke County is nearly two-thirds the size of Rhode Island, comprising an area of approximately 832 square miles. The *raison d'etre* of this lawsuit is the fact that the district is undivided in any way. That is, it is as large as it can be in a relative sense. The geographic size has made it more difficult for Blacks to get to polling places or to campaign for office. There was no evidence to show that other counties in Georgia which have recently adopted single-member districts compare pejoratively to the "at large" counties in their ability to function. On the contrary, there was testimony by defendants' witness, Mr. Thompson, that the districting requirement for election to the Democratic Executive Committee has not impaired that organization's ability to function.

The Court finds, as a matter of law, that the size of the county tends to impair the access of Blacks in Burke County to the political process.

B.
MAJORITY VOTE REQUIREMENT

Defendants, in paragraph 9 of their answer filed April 4, 1976, admit that by the original act, county commissioners are to run at-large, that the victor must be elected by a majority vote, *Ga. Code Ann.* §34-1513, and that candidates run for specific seats, *Ga. Code Ann.* §34-1015.

As has been found by *Zimmer v. McKeithen*, 485 F.2d 1297 at 1306 (5th Cir. 1973), the majority vote requirement tends to submerge the will of the minority and to deny the minority's access to the system.

This Court finds that *Ga. Code Ann.* §§34-1015 and 1513 enhance plaintiffs' lack of access to the system.

C.
ANTI-SINGLE SHOT RULE

As in *Nevett II*, there is no anti-single shot voting provision. The candidates now run for numbered positions. However, this Court concludes, as did Judge Pointer in *Nevett II*, that the numbered position method has some of the same consequences as an anti-single shot, multi-member contest because a cohesive politi-

cal group, such as the Blacks here, is unable to concentrate on a single candidate.

D.
LACK OF RESIDENCY REQUIREMENT

The present system has no residency requirement. All candidates could reside in Waynesboro, or in "lilly-white" neighborhoods. To that extent, the denial of access becomes enhanced.

II.
CONCLUSION

The Court has considered each of the *Zimmer-Kirksey* primary and enhancing factors. It concludes that eight of the eleven factors are present, here, which were present in the recent finding of dilution by the Fifth Circuit Court of Appeals in *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951 (5th Cir. 1978), that is, factors numbered 1, 2, 3, 5, 8, 10, and 11.[28] Since this

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28 Based on *Kirksey v. Hinds County*, 554 F.2d 139 (5th Cir. 1977), the court in *United States v. Forrest County*, 571 F.2d 951, 954 (5th Cir. 1978), found the following evidence constituted a successful claim of voting dilution:

1. no black had been elected to a county office;
2. retention of the poll tax as a requisite to voting until 1966;
3. retention of a literacy test until 1966;
4. conditioning of primary participation upon a pledge of party loyalty;
5. property requirements for candidates for supervisors;

is a dilution case founded upon " 'an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise,' " *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 571 F.2d 248, 255 (5th Cir. 1978) [quoting from *White v. Regester*, 412 U.S. 755, 769-70 (W.D. Tex. 1973)], the Court follows the aggregate test of *Zimmer-Kirksey*.

The evidence on the lingering effects of past discrimination, from the "Nigger-hooks" on the courthouse to the segregated laundermat, is clearly established. The direct effect of past discrimination on access to the political process is demonstrated by bloc voting by the County's hiring practices, and, to a greater extent, the County's committee and board appointment practices. The Court also finds past discrimination has played a part in today's Black low voter registration. Past discrimination has also unfairly affected the quantity and quality of the education received by Burke County's Blacks in the same way it has affected their social status. In turn, their social status, as the experts stated, has had an adverse effect on their access to the political process.

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6. designation of the county for the use of federal voting registrars;
7. disqualification of certain black candidates by the county election commission;
8. effect of a lower socio-economic level upon the blacks' ability to participate;
9. a high rate of bloc voting;
10. various electoral mechanisms;
11. lack of responsiveness to the needs of black residents.

The Court concludes that defendants are heedless of the needs of the black community, whether it be in the Blacks' concern for the quality of education or the quantity of paving. The sluggishness with which the Commission moves in response to Black demands is well-nigh the equivalent of callous indifference to that class which has fallen heir to the evil of two centuries of discrimination. The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. Such indifference attests to the Commissioners' realization of the Blacks' political impotence, both individually and collectively.

It is clear that Blacks in Burke County have a depressed socio-economic status, due in part to past discrimination. The fact that a substantial majority of Blacks have incomes of three-fourths, or less than, a poverty level income is an important factor with respect to access both to the machinery of the political processes, and to the social avenues of political access, each of which is most important in this tightly-knit, rural county.

As stated before, the Court finds Blacks have been overtly denied input into the political process by the Commissioners' failure to appoint Blacks to committees and boards in a meaningful fashion. While the above is the most blatant and pervasive denial of access which plaintiffs established, the Court finds another more subtle denial of access caused in great part by past

discrimination, and that is the proscription of black participation in the personal contract politics of Burke County Whites.

The only enhancing factor that the Court considers has a special bearing on the aggregate is the size of the district. The County is large and can reasonably be divided into districts. But more importantly, the Court finds the size of the County, in conjunction with the fact that its residents are not concentrated in the county seat, has an adverse effect on many of the plaintiffs' access to the political process.

In the aggregate, defendants' unresponsiveness is perpetuating the effects of past discrimination against plaintiffs, a group in a depressed socio-economic status, who have unfairly been denied a role in the political destiny of Burke County. Accordingly, the Court finds plaintiffs have shown a violation of the rights guaranteed them by the Fourteenth and Fifteenth Amendments. It is unnecessary to consider the complaints of violation of the First and Thirteenth Amendments.

IV.

RELIEF

In light of the Court's findings above, the Court orders, for purposes of electing the five County Commissioners for Burke County, that the County be divided into five districts as delineated in Plaintiffs' Exhibit 300.

Although various districting proposals were submitted, the Court finds plaintiffs' original plan to be superior to the others, including the similar plan submitted by defendants, because the population deviation among the districts is substantially less; *i.e.*, 2.3% as compared to 4% in the next best plan.[29]

The Court selects a five-district plan over a plan in which any member is elected at-large because no "special circumstances" [*Paige v. Gray*, 538 F.2d 1108, 1111 (5th Cir. 1976)], could be found which would justify such an exception in view of the testimony indicating the Chair has little added responsibility or authority in comparison to the other Commissioners.

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29 The following statistics show the breakdown of population of the districts in the plan selected by the Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population (%)	White Population (%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	-1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	-1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	987 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

The Court has considered defendants' request for a stay, but under the circumstances denied that request. There is ample time to overcome any administrative problems. The plan selected by the Court tracks existing Militia District lines to a great extent and should pose few problems in the conduct of the election. Moreover, on balance, the plaintiffs have the better of it. Further denial or postponement of the Blacks' right to participate fully and freely in the society of Burke County is not properly justified.

The foregoing findings and conclusions supplement the Order heretofore entered by the Court directing the election of the five Commissioners for Burke County at the same time as the general election, Tuesday, November 8, 1978.

So Ordered, this 26th day of October, 1978.

/s/ ANTHONY A. ALAIMO
Chief Judge, United States
District Court, Southern
District of Georgia

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO B. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA
APPELLANTS

VS: NO. 78-3241

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD
APPELLEES

FILED: MARCH 25, 1981

NOTICE OF APPEAL

Notice is hereby given that appellants above named (defendants in the district court) hereby appeal to the

Supreme Court of the United States from the judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on March 20, 1981, affirming the order and judgment of the United States District Court for the Southern District of Georgia, Augusta Division, entered September 29, 1978 (Findings of Fact and Conclusions of Law filed October 26, 1978), which declared unconstitutional an Act of the General Assembly of Georgia (Ga. Laws 1911, p. 380) providing for the election at-large of the five (5) members of the Board of Commissioners of Burke County, Georgia, ordered the terms of the five incumbents cut short, and ordered that a special election be held for the election of five (5) Commissioners from five, single-member districts pursuant to a plan devised by the district court.

This appeal is taken pursuant to 28 USCA 1254(2), Appellants having relied on a statute of the State of Georgia held unconstitutional as being repugnant to the Constitution of the United States by the District Court and the Court of Appeals.

The Clerk will please prepare a transcript of record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record in this case.

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/s/ E. FREEMAN LEVERETT
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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that I have served copy of the foregoing Notice of Appeal upon Mr. Robert W. Cullen, Georgia Legal Services Program, 133 Luckie Street, 8th Floor, Atlanta, Georgia 30303 and upon Mr. David E. Walbert, 1210 First National Bank Tower, Atlanta, Georgia 30303, Attorneys for Appellees, by mail, duly addressed and postage prepaid.

This March 24th, 1981.

/s/ E. FREEMAN LEVERETT
Attorney for Appellants

Office-Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals For the Fifth Circuit

JOINT APPENDIX

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Appeal Docketed June 12, 1981
Probable Jurisdiction Noted October 5, 1981

TABLE OF CONTENTS*

Page**

(1) Docket Entries
  (a) District Court 1
  (b) Court of Appeals 8

(2) Plaintiff's Second Amended Complaint 9

(3) Defenses and Answers of Defendants 17

(4) Adoption of Defensive Pleadings 23

(5) District Court Clerk's List of Exhibits
  (a) Plaintiffs' 24
  (b) Defendants' 34

(6) Agreement of Counsel As to Joint Appendix 38

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*Note: The Order and Finding of the District Court are not included herein, but are printed in the Appendix to the Jurisdictional Statement, Pages 61a-98a. The Opinion of the Court of Appeals is reported in *Lodge v. Buxton*, 639 F2d 1358 (C.A. 5th 1981), and is printed in the Appendix, pages 1a-61a.

**Note: The numbers in brackets are references to the Clerk's original record page numbers.

No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals For the Fifth Circuit

JOINT APPENDIX

(1) Docket Entries

(a) Docket Entries—U.S. District Court, Civil Action No. CV 176-55

DISTRICT	YR.	NUMBER	MO.	DAY	YEAR	J	NOS	O	R	JJ	$	OTHER	NUMBER	DEM	YR.	NUMBER
SBJ 1	76	55	04	[illegible]	76	3	440	1		X	Decl Judg	nt.	3J04			

PLAINTIFFS

HERMAN LODGE, SHELLY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D LODGE, WOODROW HARVEY, and LEVI CRAWFORD, individually and on behalf of all those similarly situated.

DEFENDANTS

CV176-5[illegible]

J. F. BUXTON, ~~RAYMOND N. DELAIG~~ QUINTON ROGERS, ROY MARCHMAN AN[illegible] RAY HARPER, individually and as members of the Board of Commissioners of Roads and Revenues for Burke County; ~~IRS MARY TILLMAN, individually and as Judge of Probate Court for Burke County;~~ and their successors in office.

A. Holland Gnann, Otto B. Johnso[illegible] and Wall T. Thompson, Individual and in their official capacities memebers of the Board of Electio[illegible] for Burke County, Ga. & Ray DeLai[illegible] Individually and in his capacity as a member of the Board of Comm[illegible] issioners of Burke County.

CAUSE Suit contesting present method of electing Board of Commissioner of Roads and Revenues, Burke County, G[illegible]

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CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	4-5-76	79063	42	JS5	
	10/2/78	86237 $3.00	SCO726	JS6	

UNITED STATES DISTRICT COURT DOCKET

DATE	NR.	PROCEEDINGS
4-5-76	1	Filing and Entering Original Complaint. Summons returnable 20-days.
4-16-76	2	Filing Marshal's Return Service perfected on Raymond N. DeLaigle, Quinton Rogers, Ray Marchman, J. F. Buxton, Ray Harper and Mrs. Mary Herrington on 4-13-76 MC 28.08
4-28-76	3	Filing Plaintiff's Amended complaint with certificate of service.
4-30-76	4	Filing Defenses of Defendants. (Motions included.)
4-30-76	5	Filing Defendants' Brief in Support of First, Second, Third, Fourth, Fifth and Sixth Defenses.
4-30-76	6	Filing Defendants First Interrogatories to Plaintiffs.
5-13-76	7	Filing Plaintiff's Motion to Add and Drop Parties. with brief attached
5-13-76	8	Filing Plaintiff's Motion for Preliminary Injunction with brief.
5-14-76	9	Filing Plaintiffs' Interrogatories, Set No. 1.
6-1-76	10	Filing Plaintiffs' Answers to the Defendants' First Interrogatories
6-1-76	11	Filing Plaintiffs' Objections to the Defendnats' First Interrogatories with cert.of svc. attach and Exhibit A
6-7-76	12	Filing Motion of Defendant to Compel Plaintiffs to Answer Defendants' First Interrogatories.
6-7-76	13	Filing Brief in Support of Defendants' Motion to Compel Plaintiffs to Answer Defendants' First Interrogatories.
6-10-76	14	Filing Order, granting motion to compel.
6-11-76	15	Filing Plaintiffs' Drief in opposition to Defendants' Motion to Compel Plaintiffs to Answer Defendants First Interrogatories.
6-14-76	16	Filing Defendants' Answers to Plaintiffs' First Interrogatories.
6-14-76	17	Filing Defendants' Objections to Plaintiffs' Interrogatories.
6-15-76	18	Filing Plaintiffs' Motion for Reconsideration and withdrawal of Order of June 10, 1976
6-21-76	19	Filing Defendants' Reply Brief in Support of Defendants Motion to Compel Discovery.
6-24-76	20	Filing Order, granting in part Motion for reconsideration.
6-25-76	21	Filing Plaintiffs' Supplementary answers to Defendants First Interrogatories to Plaintiffs
7-28-76	22	Filing Order on Motions to drop and add parties, granting same and denying defendants motion to dismiss complaint. and granting plaintiff's motion to amend, amendment to be submitted within 30-days.
8/ 2/76	23	Filing and entering Plaintiff's amended complaint No. 2, Marshal to serve, Wall T. Thompson, Otto B. Johnson,,A. Holland Gnann and Ray DeLaigle. RJC
8/11/76	24	Filing and entering answer and defensive pleadings on behalf of defendants A.Holland Gnann, Otto B. Johnson, Wall T. Thompson and Ray DeLaigle. RJC
8/12/76	25	Filing and entering Marshal return: Wall T. Thompson served on August 6, 1976.MC 3.00
8/12/76	26	Filing and entering Marshal's return: A. Holland Gnann served on August 6, 1976.MC3.00
8/12/76	27	Filing and entering Marshal's return: Ray DeLaigle served on August 6, 1976 by serving his wife. MC 5.64
8/12/76	28	Filing and entering Marshal's return: returned unexecuted, Otto B. Johnson in hospital, critical condition, returned at direction of Attorney McDonald. RJC
9-16-76	29	Filing Plaintiff's notice to take Deposition of J. F. Buxton, Roy Marchman and M. Holland Gnann with Request for Production of documents and certificate of service.
9-27-76	30	Filing Amended notice of depositions, of J. F. Buxton, Noy Marchman and M. Holland Gnann, and amended request for porduction of documents, with certificate of service. (00812)
2-31-76	31	Filing Order dismissing plaintiff's motion for preliminary injunction

CV176 ; LODGE vs. J. F. BUXTON

		FILINGS—PROCEEDINGS	AMOUNT REPORTED IN ENROLLMENT RETURNS
1-10-77	32	Filing Deposition of James Flynt Buxton.	
1-14-77	33	Filing Deposition of A. Holland Gnann	
1-14-77	34	Filing Deposition of Roy Herman Marchman.	
2-16-77	35	Filing Request that the Court take Judicial Notice of facts and laws by plaintiff.	
2-16-77	36	Filing Notice of Plaintiff to take Depositions Raymond W. Delaigle, Quinton Rogers, Bobby Webster, Charlie Kitchens and Toby Lovett and Billy Hopper., with cert. of service and request for Production of documents.	
2-18-77	37	Filing Order, granting Motion that Court take Judicial Notice of facts and laws. (at end of request, filed 2-16-77).	
2-28-77	38	Filing Plaintiff's Motion for Class determination with memo in support of motion and cert. of service.	
2-28-77	39	Filing Defendants' Third Interrogatories to Plaintiff with cert of service.	
2-28-77	40	Filing Plaintiffs' Second Interrogatories to Defedants with cert. of service.	
3-1-77	41	Filing Defendants' Second Interrogatories to Plaintiff with cert. of service.	
3-2-77	42	Filing Plaintiffs' Supplementary Answers to Defendants' First Interrogatories to Plaintiffs with cert. of service.	
3-2-77	43	Filing Defendants' Proposals for Pre-Trial Order.	
3-2-77	44	Filing Plaintiff's Proposed Pre-Trial Order.	
3-3-77	45	Filing Consolidated Proposed Pre-Trial Order.	
3-14-77		Pre-Trial hearing held this date. Trial May, 1977. Cross plans to be submitted within two weeks, to the court & parties., 2-3- day ttrial	
3-28-77	46	Filing Deposition of Mr. Robert L. Webster	
3-28-77	47	Filing Deposition of Mr. Thomas Lovett	
3-28-77	48	Filing Deposition of Mr. Charles Kitchens	
3-28-77	49	Filing Deposition of C. W. Hopper Jr.	
4-8-77	50	Filing Deposition of Mr. Ray DeLaigle.	
4-12-77	51	Filing Request of Defendants that the Court take Judicial Notice of the facts with cert. of service.	
4-12-77	52	Filing Defendants' Objections to Plaintiffs' Exhibits with cert. of service.	
4-21-77	53	Filing Plaintiff's Answers to Defendants' Second Interrogatories with cert. of service.	

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN ENROLLMENT RETURNS
1-21-77	Filing Plaintiffs' Answers to Defendants Third Interrogatories to Plaintiffs with cert. of service.	
1-28-77	Filing Plaintiff's Motion to Amend Consolidated Pre-Trial Order with brief attached and cert. of service.	
5-10-77	Filing Defendants' Answers to Plaintiff's Second Interrogatories with cert. of service.	
5-12-77	Filing Order, granting motion for class certification and granting motion to amend pre-trial order.	
8-19-77	Filing Notice of Deposition of certain persons designated on certain matters to testify for the following programs: Child Development Center for Retarded Children, Burke County Day Care Training Center, Neighborhood Youth Corp, Feed A Kid Program, OIC Program, CETA Program, FOOD Stamp Program, Participation by Burke County in CSRA Manpower council and Burke County Recreation Commission and Recreation Program. with cert. of service.	
8-19-77	Filing Plaintiff's Notice to Produce with cert. of service.	
9/7/77	Filing Deposition of C.W. Hopper, Jr.....Joyce Odom and the Deposition ofDanny Jones.	
9-15-77	Filing Deposition of Vera Goldman. sealed.	
10-11-77	Filing Deposition of Authur Stewart	
10-11-77	Filing Deposition of Isaac McKinney.	
5-24-78	Plaintiff's Request for Judicial Notice.	
3-31-78	Def's Objection to Plf's Request to take Judicial Notice. w/cs.	
6-5-78	Plf's Motion to compel by supplementation of answers to interrogatories w/order granting motion on or before 6-13-78	
6-5-78	Plfs' Motion to shorten time to respond to Plf's request for admissions (1) w/order granting same on or before 6-13-78	
6-5-78	Plf's Request for admissions (1). w/cs.	
6-7-78	Order, that Plf file supplementation of answers to interrogatories if any by June 15, 1978.	
6-8-78	Defs. Motion to compel by supplementation of answers to interrogatories, with memorandum in support of.	
6-14-78	Plf's Trial Brief. w/cs	
6-14-78	Def's Answers to Plf's First Request for admission.	
6-14-78	Supplementary answers of Defs to Plf's First Interrogatories.	
6-16-78	Plf;s Proposed Findings of Fact and Conclusions of Law	
6-16-78	Plf's Second Supplemental Answers to Defendants' First Interrogatories to Plf.	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 176-55
HERMAN LODGE, et.al.	J. P. BUXTON., et.al.	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
6-16-78	76	Plf's Supplemental Ansers to Def's Second Interrogatories to Plf
6-16-78	77	Plf's Supplemental Answers to Def's Third Interrogatories to Plf.
6-16-78	77	Further Objections to Supplementation of First and Second Interrogatories from Defs'
6-19-78	79	Def's Proposed Findings of Fact and Conclusions of Law
6_20-78	80	Plf's Second Motion to amend Consolidated Pre-Trial Order, w/order attached allowing same subjecto Def. similary right of amendment.
6/20/78		Pre-Trial hearing held this date, plaintiff to respond to interrogatories as to testimony of new witness, defendant to supply plaintiff wit h list of new witnesses and their testimony. Trial set for June 22, 1978.
6/22/78		Case called for trial testimony for plaintiff began, June 23, 1978 trial continued for the plaintiff, June 27, 1978, defendant's motion to dismiss overrulled, June 28, 1978, trial continued for plaintiff, June 30, 1978, plaintiff rest at 1:30 P.M. with testimony for defendant began, July 1, 1978, trial continued for defendant, trial to be continued at later date.
8-23-78	81	Plf's Supplemental Proposed Findings of Fact.
8-24-78	82	DEPOSITION OF IRA ROBINSON, PhD.
9/13/78		HEARING held this date, non jury, case continued on behalf of the defendants testimony and evidence, deposition of Dr. Bine to be submitted by 9/25/78, update of suggested findings and conclusion of law to fit evidence to date, in theevent Court finds in favor of disctricts parties to submit suggested district lines on a map with outline thereon by 9/25/78, 2 alternatives 1-4 districts, 2-5 districts, last week in Sept. the Court will try and get an answer.
9/26/78	83	DEPOSITION of Dr. J.M. Byne.
9/26/78	84	Plft.'s Second Supplemental Proposed Findings of Fact.
9/26/78	85	Plft.'s Post Trial Brief
9/26/78	86	AFFIDAVIT: Of David F. Walbert
9/26/78	87	Corrections to Plaintiff's Proposed Findings of Fact as Previously submitted.
9/26/78	88	Plaintiffs' Amended Conclusions of Law.
9/26/78	89	Trial Brief on Behalf of Defs.
9/26/78	90	Defs. Revised Proposed Findings of Fact and Conclusions of Law.
9/29/78	91	ORDER finding in favor of the plaintiff, 1. that the plf's are entitled to prevail, 2. that the present members of the Board of Commissioners for Burke County have been elected in an unconstitutional election and shall be replaced, 3. that Burke County shall be devided into five districts, 4. that the duly qualified voters of each district shall elect one of its residents, 5. that defendants shall open and accept qualifications for candidates for said positions commencing immediately and until 13:00 o'Clock noon, October 16, 1978, 6. that the election for said new commissioners shall be held at the same time as the General Election to be held in 1978.
10/2/78	92	STIPULATION concerning defendants' exhibits.
10/2/78	93	JUDGMENT, is hereby entered in favor of the defendants and against the plf's.
10/2/78	94	NOTICE OF APPEAL by defendants, Ray DeLaigle, Quniton Rogers, Charles Kitchens, Robert L. Webster, Thomas H. Lovett, Mas Mary Herrington & O.B. Johnson.
10/2/78	95	BOND for costs on appeal.
10/2/78	96	MOTION by defendants for stay pending appeal.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. _____ PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
10/10/78	97	PLF'S MOTION to vacate judgment.
10/10/78	98	PLF'S MEMORANDUM in reply to defendants' motion for stay.
10/10/78	99	ORDER motion to stay pending appeal is hereby denied.
10/13/78	100	AMENDED NOTICE OF APPEAL.
10/16/78	101	BRIEF of def. in opposition to plfs' motion to vacate judgment.
10/26/78	102	FINDINGS OF FACT AND CONCLUSIONS OF LAW. J.S. 6 Card.
10/30/78	103	ORDER mandate on motion to stay pending appeal denied.
10/30/78	104	ORDER clerk is directed to enter judgment upon the findings of fact and conclusions of law.
10/30/78	105	JUDGMENT entered for plaintiff and against the defendants.
11-2-78	106	CONSENT ORDER: as to place of voting precints and def's will do everything in theirpower to inform the public.
11/07/78	107	EXTENSION OF TIME for transmitting the record on appeal, extended until and and including Dec. 31, 1978.
11/07/78	108	ORDER Def's application to stay is hereby granted by the Supreme Court of The United States.
11/16/78	109	SECOND AMENDED NOTICE OF APPEAL: by Defs. w/ c.s.
12/15/78	110	PLF'S DESIGNATION of record.

DC-111A REV. 11/78

(b) Docket Entries, U.S. Court of Appeals, Case No. 78-3241

Case Docketed	October 13, 1978
Opinion & Judgment	March 20, 1981
Notice of Appeal Filed	October 2, 1978

(2) Plaintiffs' Second Amended Complaint, U.S. District Court, Civil Action CV176-55

(TITLE OMITTED IN PRINTING)

AMENDED COMPLAINT NO. 2

Plaintiffs file this their Amended Complaint No. 2 pursuant to the direction of this Court.

Jurisdiction.

1. The jurisdiction of this court is invoked under Title 28 of the United States Code, §§1331(a), 1343(3) and (4) and 2201 *et seq.*, this suit being authorized by Title 42 of the United States Code, §1983. This is an action for a declaratory judgment and injunction to prevent deprivation under color of state law, statute, ordinance, regulation, custom or usage or rights, privileges and immunities secured to plaintiffs by the Constitution and the laws of the United States, and by 42 U.S.C. §§1971, 1973 and 1983.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand ($10,000.00) dollars.

[00177]

Parties.

3. Plaintiffs Herman Lodge, Shelley Coleman, Lizzie M. Sams, K. C. Childers, Rev. David Nelson, Talmadge D. Lodge, Woodrow Harvey and Levi Crawford are adult Negro citizens and residents of Burke County, Georgia, and are duly registered to vote in said county and state in accordance with the provisions of Georgia Code §34-602. Plaintiffs desire to participate in the electoral and political process equally with other citizens of Burke County and to have their votes counted on an equal basis with those of white citizens of Burke County.

4. The plaintiffs bring this action on their own behalf and on behalf of all black citizens of Burke County pursuant to Rule 23(b) (2) of the Federal Rules of Civil Procedure.

The prerequisites of Rule 23(b) (2) are satisfied. There are common questions of law and fact. The members of the class are so numerous as to make it impracticable to bring them all before this court. The claims of the plaintiffs are typical of the claims of the class. The interests of the class are adequately represented by the named plaintiffs. Furthermore, the parties opposing plaintiffs' class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory relief with respect to the class as a whole.

5. Defendants J. F. Buxton, Ray DeLaigle, Quintin Rogers, Roy Marchman and Ray Harper are adult citizens and residents of Burke County and are the elected and acting members of the Burke County Board of Commissioners of Roads and Revenues, the governing body for Burke County. They are sued individually and in their official capacities.

[00178]

6. Defendants A. Holland Gnann, Otto B. Johnson and Wall T. Thompson are adult citizens and residents of Burke County and are the duly appointed and acting members of the Board of Elections for Burke County. Pursuant to Act No. 474, Georgia Laws, 1975, page 4506, the Board of Elections has jurisdiction over the conduct of primaries and elections in Burke County. They are sued individually and in their official capacities.

Factual Allegations.

7. In 1931, Georgia Act No. 80 created a Board of Commissioners of Roads and Revenues for Burke County, to consist of five persons to be elected for four year terms by the voters of the county as follows:

> Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act there shall be created and established a Board of Commissioners of Roads and Revenues for the County of Burke in the State of Georgia, consisting of five persons, who shall be elected by the qualified voters of said county at the general election to be held on the first Wednesday in October in the year 1912, and at each subsequent alternate general election, which election shall be held under the rules, regulations and laws governing the election of county officers in the County of Burke and said five persons shall possess the qualifications of being resident freeholders of said county for at least three years prior to said election, shall be at least 28 years of age, and eligible to election as a member of the General Assembly of the State of Georgia.

8. The Board of Commissioners is the governing and legislative body for Burke County.

9. Members of the Board of Commissioners are required to designate their candidacy for numbered commission posts, run at-large and to be elected by a majority of the votes cast.

[00179]

10. According to the 1970 United States Census of population, the population of Burke County is 18,255 of which number 7,260 are white and 10,988 are black.

11. The total voting age population of Burke County is 10,531 of which number 4,909 are white and 5,617 are black.

12. Blacks are a minority of the registered voters of Burke County.

13. The effect and purpose of the existing method of holding elections for the Board of Commissioners at-large in Burke County is to dilute the voting power of black citizens and insure that the Board of Commissioners will be exclusively or predominantly white.

14. The use of numbered posts and majority vote and run-offs for the election of the Board of Commissioners further dilute minority voting strength.

15. There has been a history of official racial discrimination in Burke County, Georgia, including discrimination against blacks attempting to exercise their rights to register and to vote.

16. Plaintiffs and their class have been unable to elect black citizens or white citizens who support their views and interests to state and local offices in Burke County.

17. No black has ever served as a member of the Burke County Board of Commissioners of Roads and Revenues.

18. The dominant political party in Burke County has in the past relied upon campaign tactics designed to exclude or dilute black voting strength.

19. Plaintiffs and their class have suffered from and continue to suffer from the effects of invidious discrimination and treatment in education, employment, economics, housing, public services and the administration of justice.

20. Plaintiffs and their class have had less opportunity than white residents of Burke County to participate in the political process and to elect representatives of their choice.

Cause of Action.

21. The present method of electing the Board of Commissioners of Roads and Revenues for Burke County, including the use of numbered posts, majority vote, runoffs and elections at-large, has the effect and is for the purpose of diluting the relative strength of the class of black voters in Burke County in violation of the rights of plaintiffs and others similarly situated guaranteed by the first, thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States.

Equitable Relief.

22. There is a real and actual controversy between the parties. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief. Plaintiffs are suffering irreparable injury as a result of the acts of the defendants complained of herein and that injury will continue unless declared to be unlawful by this court.

23. The acts of defendants described above are maintained under color of law of the State of Georgia and under color of the defendants' respective offices as officers and agents of the State.

WHEREFORE, plaintiffs respectfully pray that the court;

(a) take jurisdiction of this cause;

(b) find that plaintiffs are adequate representatives of their class and allow this case to proceed as a class action;

(c) enter a declaratory judgment that the present method of election of the Board of Commissioners of Roads and Revenues for Burke County, including the use of numbered posts, majority vote, run-offs and the holding of elections at-large, [00181] violates the rights of plaintiffs and the class they represent secured by the first, thirteenth, privileges and immunities, equal protection and due process clauses of the fourteenth and fifteenth amendments of the Constitution of the United States;

(d) issue a preliminary injunction to be made permanent later enjoining defendants from holding further elections under the present apportionment of the Board of Commissioners of Roads and Revenues for Burke County;

(e) order the Board of Commissioners of Roads and Revenues for Burke County to reapportion itself in a manner that complies with the one-person one-vote mandate of the Supreme Court of the United States and which does not have the effect or purpose of diluting the voting strength of Negro citizens of that county;

(f) submit such reapportionment plan to the Attorney General of the United States as required by 42 U.S.C. §1971c;

(g) order that all members of the Board of Commissioners of Roads and Revenues for Burke County be elected at the next general election to be held in Burke County;

(h) issue such further relief including costs and attorneys' fees as may be just and proper; and

(i) retain jurisdiction of this cause.

Respectfully submitted,

/s/ LAUGHLIN MCDONALD

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15 Peachtree Street, N.E.
Atlanta, Georgia 30303

ROBERT W. CULLEN
P.O. Box 2185
Augusta, Georgia 30903

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE AND SUMMONS
OMITTED IN PRINTING.

(3) Defenses and Answer of Defendants, U.S. District Court, Civil Action CV 176-55

(TITLE OMITTED IN PRINTING)

DEFENSES OF DEFENDANTS

First Defense

The Complaint should be dismissed for the reason that there is a failure to join indispensable parties defendant, to wit, the Board of Elections (Ga. Laws 1975 Vol. I, p. 4506), and Ray De Laigle, a member of the "Board of Commissioners of Burke County" (Ga. Code §23-803).

Second Defense

Defendants move to dismiss the complaint as to defendant, Raymond N. De Laigle on the ground that he is not a member of the Board of Commissioners of Burke County.

Third Defense

Defendants move to dismiss Mrs. Mary Herrington as a defendant on the ground that she no longer has jurisdiction or responsibility over the holding of elections and primaries in Burke County.

[00023]

Fourth Defense

Defendants move to dismiss the complaint on the ground that the same fails to state a claim upon which relief can be granted.

Fifth Defense

Defendants move to dismiss on the ground that the court is without jurisdiction in the premises.

Sixth Defense

Defendants move to dismiss on the ground that it appears on the face of the complaint that an actual case or controversy is lacking within the meaning of Article III of the Constitution and 28USCA 2201.

Seventh Defense—Answer

Defendants answer the complaint, as amended, as follows:

1.

Paragraph 1 alleges the contentions of plaintiffs and requires no answer, but defendants deny that a claim for relief is stated under any of the laws and constitutional provisions referred to, and deny that the court has jurisdiction in the premises.

2.

Paragraph 2 is denied.

3.

Answering Paragraph 3, defendants admit that the eight plaintiffs are adult Negro citizens, residents and registered voters. The remaining allegations of said paragraph are denied.

[00024]

4.

Paragraph 4 is denied, and defendants deny that the case is properly maintainable as a class action.

5.

Answering Paragraph 5, defendants deny that Raymond N. De Laigle is a member of the Board of Commissioners of Burke County, and show that the fifth mem-

ber of the Board not named is Ray De Laigle, a different person from Raymond De Laigle.

6.

Answering Paragraph 6, defendants admit that Mrs. Mary Herrington is an adult citizen and is the duly elected Judge of the Probate Court for Burke County. The other allegations of said paragraph are denied. Further answering said paragraph, defendants show that jurisdiction and responsibility for conducting elections in Burke County is now vested in a board of elections, in accordance with the Act approved April 18, 1975 (Ga. Laws 1975, Vol. II, p. 4506).

7.

Answering Paragraph 7, defendants show that by an Act of 1911 (Ga. Laws 1911, p. 390), a "Board of Commissioners of Roads and Revenues" for the County of Burke was created, to consist of five (5) members elected by all the voters of said county. Said Act was amended on several subsequent occasions (Ga. Laws 1912, pp. 340, 342; Ga. Laws 1929, p. 548; Ga. Laws 1931, p. 400), but ever since the first election under the 1911 Act held in 1912, said board has consisted of five (5) members elected by all the voters of the county. The board does not date merely from 1931, as alleged.

[00025]

8.

Paragraph 8 is admitted.

9.

Paragraph 9 is admitted. Further answering said paragraph, defendants show that the requirement that all members run at large was derived from the original Act

of 1911. The requirement that all candidates be elected by a majority vote was imposed by a general act of 1964 (Ga. Laws 1964, Ex. Sess., pp. 26, 174) and reenacted by an act of 1970, Ga. Laws 1970, Vol. I, p. 347, 380 (Code Ann., §34-1513 [a]), as amended. The requirement that candidates run for numbered posts in the general election was imposed by a general act of 1964 (Ga. Laws 1964, Ex. Sess. pp. 26, 89, and reenacted by an act of 1970, Ga. Laws 1970, Vol. I, pp. 347, 369 (Code Ann., §34-1015), as amended. Both of said acts have been approved by the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965, 42 USCA 1973C.

10.

Paragraph 10 is admitted.

11.

Paragraph 11 is admitted.

12.

For want of information sufficient to form a belief, Paragraph 12 is neither admitted nor denied. Defendants are, however, endeavoring to compile the information in issue to the extent reasonably possible.

13.

Paragraph 13 is denied.

14.

Paragraph 14 is denied.

[00026]

15.

Paragraph 15 is denied.

16.

Paragraph 16 is denied.

17.

Paragraph 17 is correct to the best knowledge of defendants at this time.

18.

Paragraphs 18, 19, 20, 21, 22 and 23 are denied.

WHEREFORE, defendants pray that the prayers of the complaint be denied, the complaint dismissed, and defendants discharged with their costs.

LEWIS & LEWIS

P.O. Box 88

Waynesboro, Ga. 30830 By: /s/ PRESTON LEWIS, JR.

HEARD, LEVERETT & ADAMS

P.O. Box 896

Elberton, Ga. 30635 By: /s/ E. FREEMAN LEVERETT

Attorneys for Defendants

NOTICE OF MOTION AND CERTIFICATE OF SERVICE OMITTED IN PRINTING.

(4) Adoption of Defensive Pleadings, U.S. District Court, Civil Action No. CV 176-55

(TITLE OMITTED IN PRINTING)

ANSWER AND DEFENSIVE PLEADINGS ON BEHALF OF DEFENDANTS A. HOLLAND GNANN, OTTO B. JOHNSON, WALL T. THOMPSON AND RAY DE LAIGLE

Come now defendants above named and adopt the Answer and defensive pleadings previously filed on behalf of the other defendants herein.

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PRESTON B. LEWIS, JR.
LEWIS & LEWIS

/s/ E. FREEMAN LEVERETT

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E. FREEMAN LEVERETT
HEARD, LEVERETT & ADAMS

Attorneys for Defendants

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(5) District Court Clerk's List of Exhibits, Civil Action No. CV 176-55

LODGE vs. BUXTON

(A) PLAINTIFFS' EXHIBITS

Adm 9/6/68	1.	Minutes of Burke County Commission - September 12, 1972
Adm 8/6/68	2.	Minutes of Burke County Commission - July 11, 1972
Adm 8/6/68	3.	Minutes of Burke County Commission - June 13, 1972
Adm 6/6/68	4.	Minutes of Burke County Commission - March 14, 1972
Adm 2/6/68	5.	Minutes of Burke County Commission - February 13, 1968
Adm 1/6/68	6.	Minutes of Burke County Commission - January 21, 1968 Special Meeting
Adm 7/6/67	7.	Minutes of Burke County Commission - July 11, 1967
Adm 2/6/65	8.	Minutes of Burke County Commission - February 9, 1965
Adm 1/6/65	9.	Minutes of Burke County Commission - January 12, 1965
Adm 7/6/65	10.	Minutes of Burke County Commission - July 13, 1965
Adm 8/6/65	11.	Minutes of Burke County Commission - August 10, 1965
Adm 8/6/65	12.	Minutes of Burke County Commission - August 12, 1965
Adm 4/6/66	13.	Minutes of Burke County Commission - April 15, 1966
Adm 9/6/66	14.	Minutes of Burke County Commission - September 13, 1966
Adm 2/6/67	15.	Minutes of Burke County Commission - February 14, 1967
Adm 5/6/67	16.	Minutes of Burke County Commission - May 9, 1967
Adm 6/6/67	17.	Minutes of Burke County Commission - June 13, 1967
	18.	Minutes of Burke County Commission - June 1, 1968
	19.	Minutes of Burke County Commission - June 11, 1968 Withdrawn
	20.	Minutes of Burke County Commission - June 25, 1968
Adm 9/6/68	21.	Minutes of Burke County Commission - September 10, 1968
Adm 10/6/68	22.	Resolution - Burke County Commission - October 8, 1968
	23.	Minutes of Burke County Commission - November 12, 1968
	24.	Minutes of Burke County Commission - January 9, 1951 Withdrawn
	25.	Minutes of Burke County Commission - January 2, 1951 Withdrawn
Adm 12/6/50	26.	Minutes of Burke County Commission - December 12, 1950
Adm 5/6/51	27.	Minutes of Burke County Commission - May 8, 1951
Adm 12/6/64	28.	Minutes of Burke County Commission - December 8, 1964
	29.	Withdrawn
	30.	Duplicate of Exhibit 31 - Withdraw Exhibit 30

31. Minutes of Burke County Commission - April 14, 1964
32. Minutes of Burke County Commission - July 9, 1963
33. Minutes of Burke County Commission - August 9, 1960
34. Minutes of Burke County Commission - July 12, 1960
35. Minutes of Burke County Commission - April 28, 1960
36. Minutes of Burke County Commission - May 11, 1976
37. Minutes of Burke County Commission - March 9, 1976
38. Minutes of Burke County Commission - February 10, 1976
39. Minutes of Burke County Commission - December 9, 1975
40. Minutes of Burke County Commission - November 11, 1975
41. Minutes of Burke County Commission - October 14, 1975
42. Minutes of Burke County Commission - May 14, 1974
43. Minutes of Waynesboro City Council - February 3, 1964
44. Minutes of Waynesboro City Council - December 30, 1963
45. Minutes of Waynesboro City Council - December 9, 1963
46. Minutes of Waynesboro City Council - November 4, 1963
47. Minutes of Waynesboro City Council - August 5, 1963
48. Minutes of Waynesboro City Council - Subsequent to June, 1963
49. Minutes of Waynesboro City Council - June 11, 1963 Special Meeting
50. Minutes of Waynesboro City Council - June 3, 1963
51. Minutes of Waynesboro City Council - April 1, 1963
52. Minutes of Waynesboro City Council - February 4, 1963 Withdrawn
53. Bennett vs. Evans Complaint - January 10, 1968
54. Bennett vs. Evans Order - June 20, 1969
55. Bennett vs. Evans Order - August 22, 1969
56. Bennett vs. Evans Order - February 5, 1970
57. Bennett vs. Evans - April 17, 1970
58. 1970 Population for Burke County
59. 1970 General Characteristics for Population of Waynesboro
60. 1970 General Social & Economic Characteristics for Burke County
61. 1970 Social Characteristics of Negro Population for Burke County
62. 1970 General Social & Economic Characteristics for Burke County
63. Employment Characteristics of Negro Population for Burke County

96. Colored Waynesboro Recreation Committee Purchase Invoice

97. Colored Waynesboro Recreation Committee Purchase Order

98. True Citizen - August 4, 1976

99. True Citizen - June 30, 1976

100. True Citizen - July 7, 1976

101. Minutes of Burke County Improvement Association - Dec. 9, 1975

102. Letter of December 5, 1975 to Burke County Improvement Association from Board of Commissioners of Burke County

103. Letter of December 1, 1975 to Burke County Board of Commissioners from Burke County Improvement Association

104. Letter of October 1, 1975 to Burke County Board of Commissioners from Burke County Improvement Association

105. Letter of August 12, 1975 to Burke County Board of Registrars from Burke County Improvement Association

106. Letter of August 21, 1975 to Burke County Improvements Association from Burke County Board of Registrars

107. Copy of memorandum to file from Chairman of Registrars

108. 1960 Census Figures - Burke County

109. 1950 Census Figures - Burke County

110. 1930 and 1940 Census Figures - Burke County

111. Court's Order and Request That the Court Take Judicial Notice of Facts and Laws - February 18, 1977

112. Deposition of Roy Marchman

113. Picture of Girard Elementary School - White - Closed

114. Picture of Girard Elementary School - White - Closed

115. Picture of Girard Elementary School - Today - Black

116. Picture of Girard Elementary School - Today - Black

117. Picture of Girard Elementary School - Today - Black

118. Picture of Girard Elementary School - White - Closed

119. Deed to Jaycees Swimming Pool - Still all White

120. Deposition of Ray DeLaigle

121. Deposition of Toby Lovett

122. Deposition of Billy Hopper - Dated February 23, 1977

123. Deposition of Charlie Kitchens

124. Deposition of Bobby Webster

125. County Wide Election Returns

126. True Citizen - March 24, 1960

127. True Citizen - March 31, 1960

64. 1970 Occupation & Earnings for Burke County

65. 1970 Occupations for Burke County

66. 1969 Income & Poverty Status for Burke County

67. 1969 Income & Poverty Status for Negro Population in Burke Count

68. 1970 Occupation of Employed and Unemployed for Burke County

69. 1970 General & Negro Housing Characteristics

70. General & Negro Housing Characteristics for Burke County, 1970

71. 1970 Detailed Housing Characteristics for Burke County

72. 1970 Detailed Housing Characteristics for Negroes of Burke Count

73. 1970 Financial Characteristics for Burke County

74. 1970 Detailed Housing Characteristics for Negroes in Burke Count

75. 1970 Detailed Housing & Financial Characteristics for Burke Coun

76. 1970 Detailed Housing & Financial Characteristics for Negroes of Burke County

77. 1970 Detailed Housing Characteristics for Burke County

78. 1970 Detailed Housing Characteristics for Negroes in Burke Count

79. 1970 Detailed Housing Characteristics for Negroes in Burke Count

80. Sapp vs. Rowland - Defendants' Answer to Request for Admission

81. Sapp vs. Rowland - Plaintiffs' Request for Admission

82. Sapp vs. Rowland - Complaint

A-82. Sapp vs. Rowland - Order and Judgment

83. Sullivan vs. DeLoach - Complaint

A-83. Sullivan vs. DeLoach - Order and Judgment

84. Letter and Affidavit - Kathleen L. Bonk

85. Deposition of Holland Gnann

86. Deposition of James Flynt Buxton

87. True Citizen - October 5, 1975

88. True Citizen - October 22, 1975

89. True Citizen - January 24, 1968

90. True Citizen - September 13, 1975

91. True Citizen - February 2, 1977 - Page 8-A

92. True Citizen - February 2, 1977 - Page 3-A

93. True Citizen - January 26, 1977 - Page 9-A

94. True Citizen - January 19, 1977 - Page 4-B

95. True Citizen - February 5, 1970

adm w/o/atty 128. True Citizen - April 14, 1960
adm w/o/atty 129. True Citizen - April 28, 1960
adm w/o/atty 130. True Citizen - June 20, 1961
adm w/o/atty 131. True Citizen - August 23, 1961
adm w/o/atty 132. True Citizen - April 25, 1962
adm w/o/atty 133. True Citizen - June 6, 1962
adm w/o/atty 134. True Citizen - July 4, 1962
adm w/o/atty 135. True Citizen - August 29, 1962
adm w/o/atty 136. True Citizen - June 5, 1963
adm w/o/atty 137. True Citizen - June 12, 1963
138. True Citizen - February 19, 1964
139. True Citizen - April 1, 1964
adm w/o/atty 140. True Citizen - July 28, 1965
adm w/o/atty 141. True Citizen - August 18, 1965
adm 142. True Citizen - August 26, 1964
adm 143. True Citizen - June 9, 1965
adm 144. True Citizen - September 1, 1965
adm 145. True Citizen - February 9, 1966
adm 146. True Citizen - June 26, 1966
adm 147. True Citizen - June 18, 1969
adm 148. True Citizen - June 25, 1969
adm 149. True Citizen - August 6, 1969
adm 150. True Citizen - August 29, 1969
adm 151. True Citizen - August 27, 1969
adm 152. True Citizen - November 19, 1969
adm 153. True Citizen - December 17, 1969
adm 154. True Citizen - December 31, 1969
adm 155. True Citizen - January 14, 1967
adm 156. True Citizen - January 28, 1978 1968 1970
adm 157. True Citizen - January 21, 1978
adm 158. True Citizen - February 4, 1978
adm 159. True Citizen - February 11, 1970
adm 160. True Citizen - February 18, 1970
Dn. 4/p 01 161. True Citizen -
adm 162. True Citizen - March 18, 1970

163. True Citizen - April 1, 1970
164. True Citizen - April 15, 1970
165. True Citizen - April 29, 1970
166. True Citizen - May 7, 1969
167. True Citizen - May 27, 1970
168. True Citizen - May 27, 1970
169. True Citizen - June 17, 1970
170. True Citizen - August 5, 1970
171. True Citizen - July 8, 1970
172. True Citizen - October 7, 1970
173. True Citizen - October 28, 1970
174. True Citizen - November 11, 1970
175. True Citizen - May 9, 1973
176. True Citizen - March 13, 1974
177. True Citizen - July 8, 1970
178. True Citizen - October 28, 1970
179. True Citizen - February 22, 1967
180. True Citizen - February 15, 1967
181. True Citizen - May 10, 1967
182. True Citizen - November 15, 1967
183. True Citizen - January 24, 1968
184. True Citizen - February 5, 1968
185. True Citizen - September 18, 1968
186. True Citizen - June 5, 1968
187. True Citizen - March 18, 1970
188. True Citizen - February 16, 1972
189. Table A.2 - Infant Health Status, Georgia 1974
190. Table A.3 - Infant Health Status Variables, Georgia 1974
191. Table 30 - Selected Vital Statistics, By County, By Race Georgia, 1975
192. Population of Counties from Earliest Census to 1970
193. Audit Report - Office of Board of County Commissioners - Burke County - Year Ended December 31, 1973
194. Audit Report - Office of Board of County Commissioners - Burke County - Year Ended December 31, 1974
195. Letter of April 27, 1975 to Chairman of Burke County Board of Commissioners from Burke County Improvement Assoc.

Adm w/o/obj 196. Letter of September 13, 1977 to Burke County Board of Education from Burke County Improvement Association and Burke County Chapter of NAACP

Adm w/o/obj 197. Letter of April 3, 1978 to Burke County Board of Registrars from Burke County Improvement Association, Inc.

Adm w/o/obj 198. Letter of March 24, 1978 to Burke County Board of Commissioners from Burke County Board of Registrars

Adm w/o/obj 199. Memo of January 18, 1978, The Department of Law, State of Georgia, Atlanta, to Mrs. Frances Duncan, Director from Michael J. Bowers, Senior Assistant Attorney General

Adm 200. Memo of February 2, 1978 to Boards of Registrars, Tax Commissioners, and Tax Collectors from Ben W. Fortson, Secretary of State

Adm 201. Letter (Date Missing) to Michael J. Bowers, Senior Assistant Attorney General

Adm 202. Letter of May 19, 1978 to Chairman, Burke County Board of Registrars from Lewis & Lewis, Attorneys at Law

Adm 203. Letter of May 16, 1978 to Mr. Preston B. Lewis, Jr., County Attorney, County of Burke from United States Department of Justice

Adm 204. Letter of April 11, 1978 to Assistant Attorney General, Civil Rights Division from Board of Commissioners of Burke County

Adm 205. Letter of February 22, 1978 to Burke County Chapter NAACP and Burke County Improvement Association from Waynesboro Country Club

Adm 206. Minuted of Community Target Area Meeting - August 18, 1975

Adm 207. Letter of March 12, 1970 to Whom It May Concern from Board of Commissioners of Burke County

208. Minutes of Briar Creek Community Meeting - May 11, 1977

Adm w/o/obj 209. Audit Report - Office of Board of County Commissioners - Burke County - Year Ended December 31, 1975

Adm 210. Audit Report - Office of Board of County Commissioners - Burke County - Year Ended December 31, 1976

Adm 211. Deed Recorded September 2, 1970, wherein County Commissioner, Peanut Rogers, sells 6.31 acres to Burke Academy, Inc.

Adm 212. Deed dated March 17, 1976 between Bottsford Spring Baptist Church and the First National Bank of Waynesboro

213. Deed Recorded May 15, 1967, wherein Claude Brown sells land in the City of Waynesboro for $100.00 to Burke Academy, Inc.

Adm w/o/obj 214. Deed Recorded November 21, 1962 wherein Burke County Board of Education sold for $5.00 land to the Keysville Methodist Church

Adm w/o/obj 215. Deed Recorded May 30, 1966 wherein Burke County Board of Education sells the Teacherage to Burke Academy, Inc. for $5.00

Adm w/o/obj 216. Incorporation of Burke Academy, Inc. dated August 16, 1961

217. Findings of Fact and Conclusions of Law in the Wilkes County of the United States of America from the United States District Court for the District of Columbia dated April 20, 1978

218. Copy of most recent budget for 1977, Burke County

219. Letter of March 25, 1977 to Honorable Anthony A. Alaimo from Neely, Neely & Player, Attorneys at Law

220. Resume of Dr. Alex Wesley Willingham

221. Publication from Georgia Department of Public Health, Infant Deaths and Rates per 1,000 Live Births, By County, By Race - Georgia 1970-1971

222. Draft of budget for 1978, Burke County

223. True Citizen - January 28, 1971

224. Summary of General Characteristics - 1970

225. Charter of the Democratic Party of the United States

226. Burke County School Attendance Figures - Submitted 10-17-67

227. Burke County School Attendance Figures - Submitted 12-18-69

228. Burke County School Attendance Figures - Submitted 10-16-70

229. Burke County School Attendance Figures - Submitted 10-13-71

230. Burke County School Attendance Figures - Submitted 10-11-72

231. Burke County School Attendance Figures - Submitted 10-1-73

232. Burke County School Attendance Figures - Submitted 10-15-74

233. Burke County School Attendance Figures - Submitted 2-1-77

234. Burke County School Staff Assignments - 1976-77

235. Burke County School Staff Assignments - 1973-74

236. Burke County School Staff Assignments - 1974-75

237. Letter of October 8, 1975 to Senator Herman E. Talmadge from Burke County Board of Education

238. Letter of October 8, 1975 to Congressman Ronald B. Ginn from Burke County Board of Education

239. Picture of Segregated Laundromat

240. Picture of Segregated Laundromat

241. Picture of Segregated Laundromat

242. Picture of Segregated Laundromat

243. Resolution in 1976 - Burke County Tax Commissioner Retiring

244. Minutes of Burke County Commission - April 13, 1976

245. Minutes of Burke County Commission - May 11, 1976

246. Minutes of Burke County Commission - June 8, 1976

247. Minutes of Burke County Commission - July 13, 1976

248. Minutes of Burke County Commission - August 10, 1976

249. Burke County 1976 Tax Digest Report - September 16, 1976

250. Resolution of Appreciation to Retiring Director of Museum

251. Minutes of Burke County Commission - September 16, 1976

252. Minutes of Burke County Commission - September 14, 1976

253. Minutes of Burke County Commission - October 12, 1976

254. Minutes of Burke County Commission - November 9, 1976

255. Minutes of Burke County Commission - November 17, 1976

256. Minutes of Burke County Commission - December 14, 1976

257. Minutes of Burke County Commission - January 11, 1977

258. Minutes of Burke County Commission - February 8, 1977

259. Minutes of Burke County Commission - February 8, 1977

260. Minutes of Burke County Commission - February 8, 1977

261. Minutes of Burke County Commission - March 8, 1977

262. Minutes of Burke County Commission - April 11, 1977

263. Minutes of Burke County Commission - May 10, 1977

264. Minutes of Burke County Commission - May 25, 1977

265. Minutes of Burke County Commission - June 14, 1977

266. Minutes of Burke County Commission - July 11, 1977

267. Minutes of Burke County Commission - August 9, 1977

268. Minutes of Burke County Commission - September 13, 1977

269. Minutes of Burke County Commission - October 11, 1977

270. Minutes of Burke County Commission - November 8, 1977

271. Minutes of Burke County Commission - December 13, 1977

272. Minutes of Burke County Commission - January 10, 1978

273. Minutes of Burke County Commission - January 16, 1978

274. Minutes of Burke County Commission - March 14, 1978

275. Minutes of Burke County Commission - April 11, 1978

276. Index of Section 5 Submissions - November 2, 1977

277. University of Georgia Reapportionment Services Unit - Burke County - July 22, 1973

278. Annual Reports of the Department of Education to the General Assembly of the State of Georgia

279. Map of Burke County

280. Blank Application for Employment for Burke County

281. Deposition of Joyce Odom

282. Deposition of Danny Jones

283. Deposition of Vera Goldman

284. Deposition of C. W. Hopper, Jr. - Dated August 25, 1977

285. Deposition of Authur Stewart

286. Deposition of George Cofer

287. Deposition of Isaac McKenney

Plan A/S/adj 288 Registered Voters Percentage

Plan W/S/adj 289 Map

EXHIBITS

Admission into Evidence	NO.	
Adm. 7-26-78	1-	Minutes of Minutes of 6-17-77 Meeting
	2-	minutes of 7-11-67 "
	3-	" " 10-12-65 "
	4-	minutes of 2-16-76 Meeting
	5-	minutes of 6-11-68 "
	6-	Minutes of March 14, 1922 of Burke City Bd of Ed. Burke County Board of Education
	7-	Minutes of Sept 12, 1922 of " " " "
	8-	" " March 12, 1924 of " " " "
	9-	" " April 9, 1924 of " " " "
	10-	Reg. Meeting minutes of June 16, 1925 of " " " "
	11-	" " " " July 8, 1925 " " " "
	12-	Commissioners' Meeting minutes of Nov. 11, 1925 of Burke City Bd of Ed
	13-	" " " " Nov. 11, 1927 " " " "
	14-	Letter Ltr. dated 2-17-76 to Ben Fortson from Notts M. Hale, Jr.
	15-	Letter Ltr. " 3-5-76 to Notts McNair from Ben Fortson
	16-	copy of newspaper article from the Iraq Citizen
	17-	copy of newspaper article from the Ben Hogan, May 17, 1976

Best Copy Available

Defendant

EXHIBITS

CASE NO. _____

Lodge
-vs-
Bolton

Admission into Evidence	NO.	DESCRIPTION
Adm. W/O Obj.	18	News story from Times Citizen, May 19, 1976
	19	Minutes of Superior Court, Oct 8, 1969
	20	Minutes of Superior Court, May 9, 1973
	21	Letter from Registrars dated Sept 10, 1975
	22	Minutes Superior Court dated Aug 30, 1976
	23	Minutes Superior Court dated April 28, 1970
	24	Minutes Superior Court dated April 5, 1971
	25	Registration Card of Herman Lodge 10-12-55
	26	Registration Card of Woodrow Harvey 1-4-56
	27	Registration Card of Levi Walker 8-15-72
"	28	Registration Card of Rev. J.M. Ellis 9-21-60
Withdrawn	29	Deposition of Vera Goldman
	30	Deposition of George Coker
	31	Deposition of Issac McKinney
	32	Deposition of Joyce Adkison
	33	Deposition of Arthur Stewart
	34	Deposition of Danny Jones
Adm. W/O Obj.	35	Article from Times Citizen Aug 31, 1977
Adm. W/O Obj.	36	Registration Card of Shelly Coleman 9-21-65
Adm. W/O Obj.	37	Registration Card of Loggie Lee James 2-19-63
Adm. W/O Obj.	38	Letter dated May 7, 1975
Adm. W/O Obj.	39	Letter dated June 17, 1975
Adm. W/O Obj.	40	Registration Card Mrs. Ruby Lee Bryant 8-7-62
Adm. W/O Obj.	41	Registration Card Mrs. Sarah Hightower 4-13-76

Defendant's

EXHIBITS

CASE NO. CV 176-55

Judge
Bufkin

Admission into Evidence	NO.	DESCRIPTION
Adm. W/O Obj.	42	Registration Card Harold N. Stinson, Jr. Harold N. Stinson Jr 7-6-68
	43	Registration Card Vivian A. Zapp Vivian A. Zapp 6-21-68
	44	Registration Card Herman Sylvia Herman Sylvia 9-17-72
	45	Registration Card Sarah Harvey Sarah Harvey 1-7-56
	46	Registration Card Levi Crawford Levi Crawford 11-17-71
	47	Article from Dawn Citizen 1978
	48	Minute meeting Aug 17, 1977 Forrest Davis Forrest Davis
	49	Minute meeting Sept 13, 1977
	50	Minute Meeting Aug 24, 1977
	51	Minute Meeting May 10, 1977
	52	Minute meeting March 8, 1977
	53	Registration Card K.C. Childers K.C. Childers
	54	Minute July 11, 1977
Adm. W/O Obj.	55	Federal Court order 6-23-70
	56	Tax Digest - Millage Rates Tax Digest - Millage Rates 1966-1976
	57	Registered Voter By Districts, 1978
	58	Ad in Dawn Citizen - Road Superintendent
	59	ad in Dawn Citizen - Councilman
	60	Radio Announcement
	61	Benton Lewis letter to McNair
	62	List of tax Exempt Organizations
NO Reference W/O Obj.	63	List of total Registered Voters Registered voters
Adm. W/O Obj.	64	Teenage birth list Statistics Dawn age birth list, Statistics
	65	Newspaper article dated March 13, 1974

Defendants

EXHIBITS

CASE NO. CV-196-55

Judge

Butler

Admission into Evidence	NO.	DESCRIPTION
Adm. 4/20 Pl.	66-	Newspaper article dated Feb 5, 1968
	67-	Newspaper article
	68-	Minutes of Commissioners dated Nov 9, 1976
	69-	Picture Black American Legion
	70-	Order Changing Polling Place (Changing Polling place)
4	71-	[redacted]
Adm. 4/20 Pl.	71-	Transportation Schedule of Elderly Food Program (Transportation Schedule of elderly food program)
	72-	Dr. Robinson (Dr. Robinson Negro)
	73-	Bobby Simms (Bobby Simms indictment)

(6) Agreement of Counsel As to Joint Appendix, U.S. Supreme Court, October Term 1980, No. 80-2100

(TITLE OMITTED IN PRINTING)

Agreement Of Counsel As To Joint Appendix

Pursuant to Rule 30 of the Rules of this Court, Counsel for the parties hereby agree that the Joint Appendix shall consist of the following:

(1) List of Docket Entries in the Court below

(2) Plaintiffs' Second Amended Complaint, filed August 2, 1976 (R. 176)

(3) Defenses and Answer of Defendants (R. 22)

(4) New Defendants' Adoption of Defensive Pleadings (R. 184)

(5) The District Court Clerk's list of exhibits

(6) This Agreement for the Joint Appendix.

Tel: (404) 656-6021

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Atlanta, Georgia 30303

/s/ DAVID E. WALBERT

Tel: (216) 574-9990

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No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM OR DISMISS

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Appellees, pursuant to Rule 16, hereby move that the final judgment and decree of the Court of Appeals be affirmed, or that this appeal be dismissed, on the grounds that: (1) the questions raised are so insubstantial that further argument is unwarranted; and (2) appellants are seeking for the first time to challenge findings that were not challenged in the Court of Appeals.

TABLE OF CONTENTS

	Page
MOTION TO AFFIRM OR DISMISS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	3
The Court of Appeals and the District Court Complied Fully With *City of Mobile v. Bolden*	3
The Other Questions Raised by Appellants are not Substantial	18
CONCLUSION	26

TABLE OF AUTHORITIES

Cases	Page
Arlington Heights, Village of v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	3
Baker v. Carr, 369 U.S. 186 (1962)	12
Castaneda v. Partida, 430 U.S. 482 (1977)	6
Columbus Bd. of Ed. v. Penick, 433 U.S. 449 (1979)	6
Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 (1979)	6
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	7
Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973)	6
Lodge v. Buxton, 639 F. 2d 1358 (5th Cir. 1981)	*passim*
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964)	12
McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981)	19
Mobile, City of v. Bolden, 446 U.S. 55 (1980)	*passim*
Smith v. Allwright, 321 U.S. 649 (1944)	16

Page

Washington v. Davis, 426 U.S. 229 (1976) .. 3

White v. Regester, 412 U.S. 755 (1973) 17

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) 4, 5, 19, 26

Statutes

Voting Rights Act of 1965 ..... 13, 20

Georgia Laws of 1958, pp. 269, 279 20

Georgia Code § 34-620 24

STATEMENT OF THE CASE

The plaintiffs in this case are black registered voters who reside in Burke County, Georgia. They filed this action to challenge the legality of at-large, county-wide elections for the five Burke County Commissioners. Since Reconstruction, no Blacks had served in elected offices from Burke County, and the plaintiffs claimed that at-large elections were currently maintained as one in a long sequence of devices used to exclude Blacks from the political process. At trial, the parties introduced voluminous evidence and the trial court found in favor of the plaintiffs on all relevant factual issues. The court found that at-large elections were being maintained for discriminatory purposes in violation of the fourteenth amendment. The Court of Appeals affirmed the District Court's opinion in all regards. *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981).

The entire spectrum of official conduct in Burke County was scrutinized by the lower courts, and they concluded that racial discrimination was a controlling motivation that permeated virtually every facet of government action in the County. The evidence showed that the County's Whites, who hold all private and public power in the community, are dedicated to perpetuating the exclusion of Blacks from any meaningful participation in civic and political affairs.

> [T]he county commissioners, acting in their official capacities, have demonstrated such insensitivity to the legitimate rights of the county's Black residents that it can only be explained as a conscious and wilful effort on their part to maintain the invidious

vestiges of discrimination. To find otherwise would be to fly in the face of overwhelming and shocking evidence. 639 F.2d at 1377.

The District Court concluded that the only effective remedy was to require a district election scheme that would allow Blacks some access to the political process and possibly elective office. No lesser remedy would have been meaningful, a conclusion the Court of Appeals soundly affirmed:

> [T]he remedy ordered is not only permitted, but, under the facts presented, it may be required. The picture the plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. The discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy. While this Court is aware of its inability to alter private conduct, we are equally aware of our duty to prevent public officials from manipulating that conduct within the context of public elections for constitutionally proscribed purposes. 639 F.2d at 1381.

In ordering district elections, the District Court merely required that election lines be drawn differently. The relief did not in any way affect the nature or operation of the county commission, nor was the responsibility of any elected or other official affected in the slightest. 639 F.2d at 1381. Thus, the relief here was much less intrusive than the relief that had been ordered in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), where the District Court substituted an entirely new form of government.

ARGUMENT

I. THE COURT OF APPEALS AND THE DISTRICT COURT COMPLIED FULLY WITH *CITY OF MOBILE v. BOLDEN.*

Both the District Court and the Court of Appeals carefully followed this Court's equal protection decisions. In the unreported District Court order, Judge Alaimo concluded that at-large elections were being maintained in Burke County for the purpose of discrimination. That at-large elections had the effect of discriminating against Blacks was obvious and barely contested by the defendants. The further finding of invidious, purposeful discrimination was decided on the basis of this Court's holdings in *Washington v. Davis*, 426 U.S. 29 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Appellants complain that the District Court's judgment preceded the *Mobile* decision, but there certainly is no need for trial court reconsideration here since the Court of Appeals carefully considered and followed everything said by this Court in *Mobile*. The Court of Appeals specifically rejected the necessity of a post-*Bolden* remand:

> A court that correctly anticipated how the intent requirement in past cases would be applied to voting dilution cases, as in *Bolden*, could correctly interpret and apply the law, without the benefit of [*Bolden*]. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case . . . . It is clear . . . that Judge Alaimo employed the constitutionally

required standard in his evaluation of the present case. 639 F.2d at 1375-76.

The *Mobile* opinions of Justices Blackmun, White, Marshall and Brennan are clearly satisfied in this case, which contains evidence and findings far beyond that in *Mobile*. And the plurality opinion — which requires more proof of invidious purposes — is satisfied since the plurality's approach is precisely the approach followed below. Judge Alaimo discussed and considered *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) kinds of evidence, as he is authorized to do under *Mobile*, but he also made independent findings of intentional discrimination that were based on the entire record. After carefully reviewing the record and Judge Alaimo's opinion, the Fifth Circuit concluded that:

> [Judge Alaimo's] order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the County's Black residents to meaningfully participate therein. 639 F.2d at 1380.

The Court of Appeals itself independently reviewed the evidence and agreed that purposeful, intentional discrimination had been proved. Indeed, the Court characterized the evidence of intentional discrimination as "overwhelming." 639 F.2d at 1380. In arriving at this conclusion, the Court followed the *Mobile* plurality and rejected the *Zimmer* test as a categorical way of determining the constitutionality of at-large elections. In rejecting *Zimmer*, the *Mobile* plurality held that the trial court must focus on the ultimate factual issue — what is the *purpose* that

motivates the adoption or retention of the scheme? The Court of Appeals plainly recognized this requirement and the limits of *Zimmer* evidence:

> Though four Justices were satisfied with the *Zimmer* criteria [in *Bolden*], five Justices clearly rejected the exclusive use of those criteria for inferring purpose or intent. We conclude that they rejected the use of the *Zimmer* criteria to the extent that [the Fifth Circuit], in *Bolden, presumed* the existence of a discriminatory purpose from the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. 639 F.2d at 1373.

At the same time, the Court of Appeals held that the *Zimmer* criteria might have some evidentiary relevance in determining purpose, as the *Mobile* plurality recognized, but that other criteria and evidence were very important and must be considered as well. The Court held that the *Zimmer* criteria may provide some evidence of intent, but they were "not dispositive on the question of intent." *Id.* at 1375. That is precisely the plurality's view in *Mobile*. 446 U.S. at 73. The Court of Appeals also followed the plurality's view and held that the *Zimmer* factors were relevant only insofar as they might elucidate the basic question of purpose. 639 F.2d at 1375.

Thus, while the appellants' *Jurisdictional Statement* reads as if the Court of Appeals wilfully disregarded *Mobile*, appellants ignore the conscientious effort of the Court to implement the *Mobile* ruling. The lower courts here considered the extensive evidence, and con-

cluded that at-large elections were maintained specifically for invidious purposes in Burke County. The trial judge himself, of course, was in the best position to make this determination. He saw and heard the dozens of live witnesses and reviewed the hundreds of exhibits, and he is best able to determine what weight and credibility, if any, each one was entitled to.

The only real holding here that may not have been stated explicitly in *Mobile* is that "smoking gun" evidence is not a prerequisite to finding purposeful electoral discrimination. Instead, the lower courts relied on a tremendous amount of other evidence; an assessment by the trial judge of the credibility of the various witnesses, including the defendants; and thorough testimony concerning any other, nondiscriminatory purpose that the election scheme might have served.

While the *Mobile* case itself may not explicitly hold that such evidence is sufficient to prove purposeful discrimination, that is clearly the position of this Court. Circumstantial evidence has repeatedly been deemed sufficient to support findings of purposeful discrimination in other contexts. *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Ed. v. Penick*, 433 U.S. 449 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973). Only if this Court were prepared to reject this position and require absolute, admission-type proof of intent, would there be any point of law that could warrant full argument in this case. Obviously, this Court would not adopt such an extreme and absurd rule. As the Court of Appeals stated:

> [A]ssuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so Blacks won't get to participate." . . . Quite simply, there will be no "smoking gun." 639 F.2d at 1363 n. 8.

The *Mobile* plurality says nearly as much since it recognizes the probative value of evidence that is far less than the "smoking gun" variety, including impact evidence, *Zimmer* evidence, etc.

The appellants' only real complaint here is with the facts that have been found against them, but as the Court of Appeals concluded after reviewing the record:

> Judge Alaimo's evaluation of all the relevant evidence was thorough and evenhanded. *His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact, virtually mandated by the overwhelming proof. Id.* at 1380 (emphasis added).

This Court should not review factual determinations concurred in by two federal courts unless there has been "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). No such error can exist where the evidence is "overwhelming." And no such complaint should even be entertained here since not a single finding of fact was even challenged as clearly erroneous in defendants' main brief in the Court of Appeals. *See Brief of Defendants-Appellants* (filed June 5, 1980)

Nevertheless, it may be of some assistance to this Court for appellees to identify some of the evidence relied on below in finding invidious and purposeful discrimination. In assessing any of this evidence, one must keep in mind, as background, that the plaintiffs proved that racial discrimination pervades Burke County. The evidence showed that everything possible has been done to exclude Blacks from public life in Burke County. Based on all of the testimony, the District Court characterized the attitudes of the defendants as follows:

> The Court concludes that defendants are heedless of the needs of the Black community, whether it be in the Blacks' concern for the quality of education or the quantity of paving. The sluggishness with which the Commission moves in response to Black demands is well-nigh the equivalent of callous indifference to that class which has fallen heir to the evil of two centuries of discrimination. The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. (J.S. at 95a)

The Court found that "the County Commissioners, as an elected body, have acted with an insensitivity to the particularized needs of the black community amounting to unresponsiveness." (J.S. at 77a) And the Court also concluded "that the insensitivity of defendants to the needs of the plaintiff class exists because of invidious racial motivations." (J.S. at 82a)

The Court of Appeals independently reviewed the evidence of the defendants' dealings with Blacks and came to the same conclusion. Commenting on certain

examples of blatant racial discrimination, the Court stated that:

> Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke County in every interaction they have had with the White controlled bureaucracy. 639 F.2d at 1377 n. 37.

Simply put, plaintiffs proved that Burke County continues to be dominated by a firm commitment to white supremacy. Whatever degree of racial progress there has been in the County has invariably been the result of federal compulsion. The testimony revealed no instance where Whites have voluntarily admitted Blacks to any facet of public or private life in Burke County, whether it be the school system, public accommodations, employment opportunities, or the political process. This pervasive pattern of racial exclusion certainly provides some evidence that the at-large system also serves an exclusionary purpose. Indeed, it would stand reason on its head to suggest that white people would share ultimate political power in the County with Blacks, when Whites have refused to share with Blacks much lesser aspects of public and private life in the County.[1]

The defendants were not even particularly coy about

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[1] Several witnesses testified to the concerted efforts to keep Blacks from political life. One witness described Burke's Whites as having "tremendous horror of Blacks coming into power there." (T. Vol. I at 115) Another testified that politics was still considered a "White man's game" from which Blacks should be excluded. *Id.* at 551-52.

their attitudes. Several admitted their adherence to segregation (T. Vol. I at 257-59, 264-66, 279), although the chairman of the county commission ventured the opinion that desegregation might ultimately be accepted in Burke County in another thirty years. (T. Vol. I at 378) Another commissioner testified that Blacks are still openly called "niggers" in county commission meetings. (T. Vol. I at 242-44) The "colored" and "white" signs are still fully visible on the courthouse restroom doors, and the "nigger hook" still remains in the courthouse as a reminder of white attitudes towards Blacks. (J.S. at 77a-78a, 94a) Only a block away from the courthouse, the white laundromat is as segregated today as it was twenty years ago (J.S. at 77a, 94a), a fact that no county commissioner has ever found objectionable. Indeed, a Black witness testified that she had been thrown out of this laundromat just a few days before trial. (T. Vol. I at 332-34)

No county commissioner admitted that the at-large election scheme was being purposefully used to exclude Blacks. But they all did testify to the traditional White Supremacist rationalization for the exclusion of Blacks from politics and elected office — "they're just not interested." (*E.g.*, T. Vol. I at 308-09) In light of the compelling evidence that Blacks are excluded from the political process in Burke County by the at-large election scheme, one can only be amazed at the temerity of defendants to justify that exclusion on such a flimsy basis.

Overall, plaintiffs provided the courts with a compelling picture of the intense hostility of Burke County's white political powers towards racial advancement or equal treatment of black citizens. The District Court

was shocked at the extent to which the county commissioners refused to allow Blacks any role in Burke County's public and political life.

> It is the Courts' impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The commissioners have been singularly unresponsive to this need. (J.S. at 78a)

Blacks "have been forced outside the local government." (J.S. at 81a) Because they are excluded from the political process, Blacks have been left only two possible avenues for redress — the federal courts and the streets. *Id.*

This powerful evidence would be enough in its own right to uphold the lower courts' findings that at-large elections were intentionally used as a means to limit black participation in the electoral process, but this evidence hardly stands alone. One of the County's preeminent white political figures was called as a defense witness and asked to compare district and at-large voting for Burke County. (T. Vol. III at 97-99) He acknowledged that the "only reason" he could think of to distinguish the two was race and a policy of preferring one race over the other. *Id.* at 101-02.

Indeed, the defendants themselves could offer no serious alternative purpose that was served by at-large elections, other than racial exclusion. When questioned about the drawing of district election lines, the county commissioners saw no factors that would impede the

establishment of such a system. Each just emphasized that any districts should have equal populations. (T. Vol. I at 422-24, 460-62) Appellants' *Jurisdictional Statement* urges no other purpose in this Court, so the appellants are now foreclosed from even suggesting that some non-racial purpose justifies the use of at-large elections.[2]

More importantly, the actual evidence here simply refuted any showing of another purpose. Based on all of the evidence, the lower courts found only one purpose behind the utilization of at-large elections, and that was race. Both the plaintiffs and defendants tendered district election plans which showed that there was no difficulty in creating such a system in Burke County. Judge Alaimo specifically found that there would be little or no voter confusion with a district plan (J.S. at 98a), and he concluded that it was so simple to institute district elections that it could be done and elections conducted under the plan in just a few weeks time. He noted as well that the Burke County Democratic Party elected its governing board from districts (pursuant to the command of the State Democratic Party), and that district scheme created

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[2] Even in the Court of Appeals, the appellants' assertion of non-racial purposes was thinly transparent. The suggested purposes were: (1) to avoid alleged voter confusion and complications; and (2) to avoid reapportionment after a census. *Defendants' Supplemental Brief* at 12. This latter rationale is patently unacceptable. It would mean that *Baker v. Carr*, 369 U.S. 186 (1962), is no longer good law if the mere avoidance of reapportionment would be a sufficient "purpose" to retain an election system that is otherwise unconstitutional. And the former reason is even stranger since district election systems are normally considered to be less confusing to the voter, not more, as this Court has pointed out. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 731 (1964).

no problem whatsoever. (J.S. at 91a) Judge Alaimo also found that other local governments are elected in Georgia by district and function perfectly well. *Id.*[3]

All the evidence of intent and motive in this case supports the lower courts' conclusion that race is the purpose behind county-wide elections. This conclusion is further buttressed by the evidence of defendants' direct efforts to keep Blacks from participating in the County's political affairs. Since enactment of the Voting Rights Act of 1965, defendants have continued to do what they could to minimize Black voter registration. Burke County is very large, over 800 square miles, yet the county commissioners maintained only one registration site in the whole County. The Court of Appeals noted that this kind of "overt conduct" that was used to minimize Black registration was "taking place even at the time the present lawsuit was filed." 639 F.2d at 1377 n. 38.

Defendants have also tried to keep Blacks out of public affairs by refusing to appoint them to the many public agencies and commissions which exercise a tremendous amount of governmental authority in the County. (J.S. at 78a) The District Court went on to

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[3] It should be noted also that the purpose issue here is different than in *Mobile*. In *Mobile*, the plaintiffs sought to replace the executive commission government with an entirely different form of government, one with a mayor and council. To justify such relief, the plaintiffs there had to prove that the very form of government was adopted or maintained for invidious purposes. Here, the plaintiffs merely challenged the location of the election district lines as discriminatory, which is inherently easier to prove. Thus, while the *Mobile* evidentiary requirements are satisfied in this case, a somewhat lower level of proof might even be sufficient because the essential form of government is not at issue here.

find that "the Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a meaningful fashion, is without doubt an unfair denial of access to input into the political process." (J.S. at 89a) Since the defendants do not believe that Blacks are fit to serve on these appointed governmental bodies, surely the defendants do not consider them fit to enjoy the highest elected office in the County, that of county commissioner. The exclusion of Blacks from these appointed positions was explained solely on the basis of race. Similarly, the exclusion of Blacks from the county commission, through the use of the at-large election system, was explained at trial on no ground other than race.

This is just a small sample of the evidence of the efforts and desire to exclude Blacks from public and private affairs. There has been a concerted and uninterrupted pattern of official behavior designed to eliminate Blacks from all walks of life, including the political process. As the lower courts concluded, there is far more than enough evidence to find that the continued use of at-large elections is racially motivated.

Completing this tragic picture of fierce official racism is the extensive evidence the lower courts discussed concerning the exclusion of Blacks from the political process through a variety of means that operate in connection with the at-large system. This further evidence is relevant in at least two ways. It provides additional circumstantial evidence that buttresses other inferences as to the invidious purposes underlying at-large elections. And secondly, as the Court of Appeals reasoned, this kind of evidence shows how

easy it is in Burke County to use at-large elections specifically in order to discriminate. 639 F.2d at 1379. This enhanced possibility of discrimination must be kept in mind when the ultimate question of purpose is decided by a court.

For example, the lower courts noted the great socioeconomic disparity between Blacks and Whites in Burke County.[4] This disparity is itself largely a result of slavery and past purposeful discrimination, 639 F.2d at 1379 & n. 46, an obvious fact admitted by the defendants' own expert. (Robinson Depo. at 42) (J.S. at 83a) As to educational discrimination and disparities, the District Court found that "the unbroken history of an inferior formal education has had and does now have a strong tendency to preclude Blacks' effective participation in the political process." (J.S.

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[4] The appellants err when they argue that socioeconomics are irrelevant to this case. First of all, the lower courts did not conclude that a disadvantaged group is "entitle[d] . . . to some special dispensation in the area of voting rights." (J.S. at 20) Secondly, appellants ignore the findings that past purposeful discrimination has largely caused the socioeconomic disparities between Blacks and Whites in Burke County. Third, one must again remember that the "ease of discrimination" is a significant point. It is simply easier to use at-large elections to discriminate against Blacks in Burke County than it might be in a county where Blacks enjoy relative socioeconomic parity with Whites.

Similarly, appellants err in rejecting the relevance of discrimination by other government bodies, such as the school board. The lower courts did not "impute" unconstitutional discrimination from one body to another, as appellants allege. (J.S. at 25-26) The purposeful discrimination in the schools was found to directly impact on the ability of Blacks to participate equally in the electoral process (J.S. at 84a-85a, 88a-89a, 95a-96a), a fact ignored by appellants. And these facts again provide some degree of circumstantial evidence that supports an inference of intent in the use of at-large elections.

at 84a-85a)

One of the most striking facts that indicates the thorough exclusion of Blacks from the political life of the County is the lily-white Burke County Democratic Party, whose nominees invariably win local elections. The party has hardly changed since this Courts' decision striking down the segregated Democratic Party in 1944. *Smith v. Allwright*, 321 U.S. 649 (1944). Of 24 members on the county governing body of the Democratic Party, only one was Black, 639 F.2d at 1379, and he was an apparent token who had never even been to a party meeting. (T. Vol. I at 438, 532-33)

Nevertheless, appellants still assert that there was "no evidence" to support the finding that Blacks have been "excluded" from the Party. (J.S. at 25) In truth, the Committee operates a self-perpetuating private club with members either appointed to vacancies (T. Vol. I at 437-39), or solicited by the members to run for election, invariably without opposition. (T. Vol. II at 913-14) The Democratic Executive Committee has recently begun publishing formal legal advertisements, pursuant to state party requirements, that announce its elections. But these ads are obviously not designed to give any real public notice of party activities. D. Ex. 17. The local Democratic Party has been completely successful in maintaining virtual secrecy, as indicated by the testimony of one of the County's most active Blacks who had never even heard of the Democratic Committee. (T. Vol. I at 692, 737)

The District Court found that the segregated Democratic Committee plays an important role in local politics. (J.S. at 87a) That should be obvious since

every elected official who was asked at trial testified that he had been a member or officer of the Democratic Committee. (T. Vol. I at 437-39, 474, 532; Vol. II at 880; Vol. III at 98-99) Thus, whatever formal power the Committee may enjoy, it is certainly tremendously influential in determining who is elected to office. It is instructive to compare these facts to those found sufficient to prove purposeful discrimination by this Court in *White v. Regester*, 412 U.S. 755 (1973). The "slating" relied on in Dallas County was extremely mild by comparison to the kind of racial exclusion that exists in Burke County.[5]

The pervasive segregation in Burke County, which is a direct consequence of past purposeful discrimination, further undercuts the ability of Blacks to participate in politics. The Court of Appeals noted "that person-to-person relations, necessary to effective campaigning in a rural county, [are] virtually impossible on an interracial basis [in Burke County] because of the deep-rooted discrimination by Whites against Blacks." 639 F.2d at 1379.

Other official mechanisms have been used to eliminate Blacks from Burke County's public life. The Court noted that Blacks had been excluded from juries until a court order was entered one year before the trial of this case. (J.S. at 75a) And Blacks were un-

[5] In Dallas County, like here, anyone could legally qualify to run in the Democratic Primary. Blacks were found to be unconstitutionally excluded from the political process in Dallas County because a white-controlled civic organization had substantial political clout in the County. The degree of exclusion here is markedly greater since Blacks are excluded from the Democratic Party itself, rather than from some private civic organization.

constitutionally excluded from elections in the city of Waynesboro, the seat of government in Burke County, until a reapportionment order was entered recently by the District Court. 639 F.2d at 1378 n. 42. The District Court also noticed the many Georgia laws that had an expressly racial purpose and were passed by the Georgia General Assembly in the relatively recent past. (J.S. at 76a)

Finally, the lower courts noted that there were certain formal factors that, although possibly legitimate in their own right, "enhanced" the ability of the defendants to manipulate at-large elections for the purpose of excluding Blacks. 639 F.2d at 1379-80. Among these factors were the majority vote requirement and the numbered post requirement which ensure that the white voting majority will control the election of every single county commissioner. Interestingly, these mechanisms were only added to Georgia's laws in 1964 (J.S. at 65a n. 2), precisely when Blacks were beginning to register to vote and assert their political rights. Even as recently as 1976, when Georgia adopted a new Constitution, the State included literacy, understanding and character tests, which are presently inoperative solely because of the strictures of the federal Voting Rights Act. (J.S. at 86a n. 23)

II. THE OTHER QUESTIONS RAISED BY APPELLANTS ARE NOT SUBSTANTIAL.

First, appellants contend that the Court of Appeals' emphasis on responsiveness was error. (J.S. at 17-19) The Court of Appeals held that unresponsiveness must be proved before plaintiffs can prevail, and it is true

that this additional element was not mentioned as a legal prerequisite by any member of the Court in *Mobile*. But if the Court of Appeals is incorrect, that could only be a ground for complaint by an unsuccessful plaintiff who fails to satisfy this additional burden. The appellants are in no position to complain about this aspect of the ruling below since they could not possibly have been adversely affected by it.

Next, appellants claim that various decisions of the Fifth Circuit are inconsistent. (J.S. at 16-17) Even if true, that would hardly present a substantial question for appeal. But more importantly, this contention shows how appellants have misunderstood the ruling of the Court of Appeals in this case. In *McMillan v. Escambia County*, 638 F.2d 1239, 1247 n. 16 (5th Cir. 1981), the Fifth Circuit held that *Zimmer* was "invalidated by *Mobile*." *McMillan* was decided before *Lodge*, and it shows that the Fifth Circuit fully understands the import of *Mobile*, contrary to appellants' urgings. *Lodge*, like *McMillan*, expressly recognized that the *Zimmer* approach was rejected by the *Mobile* plurality. *Lodge* simply followed *Mobile* and considered *Zimmer* evidence to the extent that it bore a direct evidentiary relation to the intent question.[6]

Finally, appellants challenge certain findings as

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[6] Appellants also challenged the relief here on the ground that they should have been allowed to enact a new apportionment plan and seek approval under section 5 of the Voting Rights Act. (J.S. at 28) Like most of appellants "issues," this one was never raised on appeal to the Fifth Circuit. *See Brief of Defendants-Appellants, supra.* Moreover, the point is moot. Upon affirmance by this Court, the defendants may comply with the judgment and proceed to enact new district lines and submit them under section 5.

erroneous. (J.S. at 24-25) These contentions are wrong, and they are untimely because no such contentions were properly raised in the Fifth Circuit. *See Brief of Defendants-Appellants*, filed June 5, 1980. One of these contentions is sufficiently serious and oft-repeated, however, that a brief review of the evidence is necessary. Appellants state on at least four occasions that there has never been any difficulty registering or voting in Burke County. (J.S. at 5-6, 20, 21, 24) The evidence to the contrary is overwhelming. First is the simple statistical evidence. Before the Voting Rights Act of 1965, only a few Blacks were registered (J.S. at 71a), and even now only 38% of the registered voters in the County are Black even though voting-age Blacks are about 50% of the population.[7] These facts alone are substantial evidence of the consequences of discrimination. (J.S. at 72a)

Defendants' witnesses admitted that many people who could not pass the literacy test had to take Georgia's infamous "Question and Answer Test." (T. Vol. II at 812-13) This test was obviously designed solely to exclude potential voters since the necessary twenty questions probably could not be answered by anyone in the whole state. *See* Ga. Laws of 1958, pp. 269, 279.

Appellants incorrectly state that several black witnesses who testified never had difficulty registering

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[7] Appellants incorrectly state that Blacks could "take over" the county because they are a voting age majority. (J.S. at 20) The Black population in the county has dropped continuously from 78% in 1930 to a bare majority today. 639 F.2d at 1361 n. 2, as amended by Order filed April 8, 1981 (J.S. at 60a-61a) (amending population figures to correct typographical errors). There is no longer a Black majority of *voting age* residents.

or voting. In fact, one had to make three or four round trips to Waynesboro (from 60 to 80 miles) to register (T. Vol. I at 71-73, 93-94); another was greeted by the registrar's "nasty tone," *id.* at 152; the registrar only filled out another's card "grudgingly," *id.* at 712-14; and one was told he could not vote because his taxes were not current, *id.* at 741, an edict unauthorized even under Georgia law.

Defendants' own witnesses testified that people were required to make two trips to the courthouse in Waynesboro to register before the Voting Rights Act, one to apply and one to take the test (T. Vol. II at 801-02), even though a deputy registrar could easily have been named to take care of everything in one trip. *Id.* at 809-11. Of course, the two trips were not required of everyone. Even a few Blacks who had influential Whites vouch for them were spared any test or return trip. (T. Vol. I at 312-14, 328-29) The registration process was aptly described as "completely arbitrary" and characterized by "bureaucratic nastiness." *Id.* at 553-54.

To this day, registration has been made as difficult as possible in Georgia as a whole and in Burke County in particular. House-to-house and mobile voter registration are still illegal in Georgia, which obviously impedes registration. *Id.* at 675-77. Yet defendants' own witness, a registration official, admitted there would be no practical difficulty in allowing house-to-house registration drives. (T. Vol. II at 815) The county registrars have never attempted to stimulate registration with any sort of drive or voter education project, *id.* at 815-16, and the officials openly admitted

that the low level of black registration was of no concern to them. (T. Vol. I at 392-98; Vol. II at 780-81, 799, 813)

The 1965 response to the civil rights movement and the Voting Rights Act was less than sanguine, of course. The State adopted the majority vote and numbered post laws that lock in white control. Burke County wanted to eliminate all of its polling places, except the central Waynesboro location, because that would have made it much more difficult for the rural black voters (who had less access to cars than Whites) to get to the poles. The county commissioners sought a legal opinion on this proposal (P. Ex. 11), but the action was blocked by section 5 of the Voting Rights Act.

Even though the County was unable to shut down its polling places, it has been able to keep registration as inaccessible as possible. Registration was allowed only at the courthouse in Waynesboro, although this was very inconvenient for the many Blacks too poor to have transportation.

Black civic organizations had tried for the past decade to get additional registration sites without success. (T. Vol. I at 734 & P. Exs. 100-107) They were even told that it was illegal in Georgia to register anywhere other than the courthouse, and they had to go to the Secretary of State to override that particular instance of deviousness. (T. Vol. I at 734) Of course, maintaining registration only at the courthouse served not only as a geographical deterrent, but also as a strong psychological deterrent. The county courthouse

remains today a prime symbol of white domination. *Id.* at 556-57. "Nothing good" ever happened to a black person there, from a lynching in the past, *id.* at 244, to present discrimination in the administration of justice, *id.* at 750, employment (J.S. at 75a-76a), and all other facets of government conduct (J.S. at 77a-82a), etc. Even the most established and outspoken black civic leader is still haunted by deeply instilled anxieties when he approaches the county courthouse. (T. Vol. I at 676-77)

The refusal to expand registration facilities beyond the courthouse was obviously calculated to reduce black registration, and the scheme has worked well. Defendants' own witness admitted that there was no reason why more sites could not be established (T. Vol. II at 814-15), but none came to pass until after this case was filed and pressure was applied by the District Court.[8] Thus, there was clear, ongoing, overt denial of the right simply to register and cast a ballot when this case was tried. 639 F.2d at 1377 n. 38. Even after the Court forced some liberalization of the registration process, the total number of sites remained woefully inadequate. (T .Vol. I at 557-58, 575-76, 604-06, 743-44)

While the county has exhibited tremendous hostility

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[8] Appellants claim that they were not really forced to expand registration opportunities. (J.S. at 24) Again, this factual challenge was never presented to the Court of Appeals, and ignores the evidence as well. The most favorable evidence to defendants was that new registration sites were established for a period of four days just before the 1976 election. (T. Vol. II at 958 & P. Ex. 99) But Black people testified that there were no registration materials there and the person supposedly in charge told them he had no idea about registration. (T. Vol. I at 318-21)

to voter registration, it has shown the opposite reaction to voter purging. *See* Ga. Code § 34-620. Although the County turns down Blacks who volunteer to serve as unpaid deputy registrars (T. Vol. I at 724; Vol. II at 954-56), the county eagerly pays people to cull the voting lists whenever possible. *Id.* at 818-20.

Politics remain a "white man's game" in Burke County. Blacks are never appointed as deputy registrars or poll managers and only very rarely have they ever appeared even as lowly poll workers on election day. The whole electoral process is successfully maintained to insure the message of white supremacy. As one witness testified, it does not look any different than it did in 1962. (T. Vol. I at 568)

Finally, one cannot separate these conditions from the pervasive fear among Blacks that has been so ingrained over the years. Fear remains an active force in Burke County that impedes black voter registration and political activity, particularly because of the tenuous economic status of Blacks and the possibility of retaliation. (T. Vol. I at 115, 126, 137, 152-53, 177-78, 244, 551-55, 567-68, 671-73, 675-77)

Many witnesses described the pervasive problem of fear in different ways. In one case, it was the inability of a black civic organization to maintain membership records for fear of retaliation against its members. *Id.* at 670. In another case, it was personal physical threats of bombings and the like, *id.* at 671-73, and in another, it was a shooting episode directed at a young black girl who dared to go to the white public school. *Id.* at 682-84. In another instance, it was the fact that

the black ballot box was always left open until well into the 1960's so Whites could find out who a particular Black was voting for. *Id.* at 689-90. The fear among Blacks that their ballot is not even secret naturally persists to this day. *Id.* at 691-92.

While this is only a small bit of the evidence of difficulties involved in registering and voting, it should be enough to put to rest appellants' claim that Blacks have always voted and registered without difficulty in Burke County.

CONCLUSION

In sum, the evidence of purposeful discrimination in this case was accurately characterized by the Court of Appeals as "overwhelming." The lower courts were faced with an election system that appears neutral on its face, but which is blatantly perverted to abridge the rights of Blacks. In making this finding, the lower courts did not just follow *Zimmer*. They considered a tremendous amount of evidence and found intent based on the entire record, fully in accord with *Mobile*.

The decision of the Court of Appeals should be affirmed without further delay. The precious right to vote has never been fairly extended to Blacks in their more than two hundred year history in Burke County. Not until this Court acts can the lower courts proceed to implement a final remedy and bring some degree of democracy to Blacks who have waited patiently for the same rights given white people for nearly three centuries.

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No. 80-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals For the Fifth Circuit

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in construing this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), as holding that proof of the voting dilution criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), is still sufficient to establish an *inference* of purposeful discrimination in the retention of an at large voting system in effect since 1911, found by the district court below to have been "racially neutral" when adopted, and that the only effect of *Bolden* is to hold that the *Zimmer* criteria are no longer sufficient to establish a *presumption* of purposeful discrimination in the retention of the at large system?

(2) Whether the Court of Appeals also erred in holding that another aspect of *Bolden* is to require courts in voting dilution cases to attribute controlling significance to the question whether the political body in issue has been unresponsive to the needs of the black community, contrary to the principle that courts can not resolve purely political questions for which judicially manageable standards are lacking or pass upon the wisdom of legislation?

(3) Whether the Court of Appeals erred in holding that plaintiffs had carried the burden of proving a case of purposeful discrimination in the retention by Burke County of its at-large system of electing its five county commissioners, based upon evidence of the *Zimmer* criteria, not as strong as that held insufficient in *Bolden*, plus a finding of a "depressed socio-economic status" affecting blacks in Burke County? Embraced within the foregoing is the subsidiary question as to whether the action of the Court of Appeals is tantamount to invalidating an at-large plan without requiring a showing of

purposeful discrimination.

(4) Whether the Court of Appeals erred in holding that a case of unconstitutional vote dilution arising from an at-large system of election can be established under the Fifteenth Amendment?

(5) Whether the doctrine of unconstitutional dilution of voting rights arising from an at-large election system is applicable to county governing bodies?

(6) Whether, assuming that even after *Bolden*, the *Zimmer* criteria are still sufficient to give rise to an inference of purposeful discrimination as held by the Court of Appeals below, the finding in this case is nevertheless clearly erroneous on the evidence presented?

(7) Whether, even assuming that the existing at-large plan was unconstitutional, the district court below erred in ordering into effect a single member districting plan submitted by plaintiffs, deliberately gerrymandered to favor plaintiffs, in lieu of a plan submitted by defendants, without having first found and declared the defendants' plan to be invalid and insufficient in law, and without having afforded defendants an opportunity to submit their plan for preclearance under Section 5 of the Voting Rights Act, 42 USCA 1973c, contrary to the decisions in *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), and *Berry v. Doles*, 438 U.S. 190 (1978).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CITATION OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATE STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
(1) The Court Of Appeals Erred In Holding That The *Zimmer* Criteria Are Sufficient To Establish A Case Of Unconstitutional Dilution, And In Refusing, For The Fourth Time, To Follow The Decisions Of This Court	8
(2) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions	16
(3) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution	18
(4) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court	20
(5) The Decision Below Is Not Sustainable Under *Kirksey*, 554 F.2d 139	21
(6) *Mobile v. Bolden* Is Not Distinguishable On The Ground That An Entire System Of Government Was At Issue In That Case	25

TABLE OF CONTENTS—Continued

Page

(7) No Claim Under Section 2 Of The Voting Rights Act Was Shown, For It Also Requires A Showing Of Discriminatory Purpose..... 26

(8) The Dilution Doctrine Does Not Apply To County Governing Bodies..... 29

(9) Even Assuming The Validity Of The *Zimmer* Criteria, Dilution Was Not Established In This Case..... 30

(10) There Was No Proof Of Discriminatory Purpose In The Enactment Or Retention Of The At-Large System..... 38

(11) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act..... 42

(12) The Judgment Below Should Be Reversed And The Case Remanded With Directions To Enter Judgment For Defendants..... 42

CONCLUSION..... 43

TABLE OF AUTHORITIES

Page

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Berry v. Doles, 438 U.S. 190 (1978) ..... ii, 42

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Bolden v. City of Mobile, 423 F. Supp. 384 (D.C. Ala. 1976) 16, 17, 22, 28

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California, University of, v. Bakke, 438 U.S. 265 (1978) 15, 23

Cipriano v. Houma, 395 U.S. 701 (1969) 18

Coleman v. Miller, 307 U.S. 433 (1939) 17

Cooper v. Aaron, 358 U.S. 1 (1958) 13

Corder v. Kirksey, 639 F.2d 1191 (C.A. 5th 1981) 13

David v. Garrison, 553 F.2d 923 (C.A. 5th 1977) 14, 37, 40

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 24

Debra P. v. Turlington, 664 F.2d 397 (C.A. 5th 1981) 13

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TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Ex Parte Howard, 9 Wall. 175 (1870) 13

Hill v. Stone, 421 U.S. 289 (1975) 18

James v. Strange, 407 U.S. 128 (1972) 18

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) 7, 21, 22, 24, 34

Kirksey v. City of Jackson, 625 F.2d 21 (C.A. 5th 1980) 13

Lassiter v. Board of Elections, 360 U.S. 45 (1959) 35

Lau v. Nichols, 414 U.S. 563 (1974) 29

Levin v. Mississippi River Fuel Corp., 386 U.S. 162 43

Lodge v. Buxton, 639 F.2d 1358 (C.A. 5th 1981) 1, 5, 13, 20

Lora v. Bd. of Educators, 623 F.2d 248 (C.A. 2nd 1980) 29

Maher v. Roe, 432 U.S. 464 (1977) 18

McGill v. Gadsden Co. Commission, 535 F.2d 277 (C.A. 5th 1976) 14, 30, 33

McMillan v. Escambia County, 638 F.2d 1239 (C.A. 5th 1981) 7, 20, 21, 27

Milliken v. Bradley, 418 U.S. 717 (1974) 37

Milliken v. Bradley, 433 U.S. 267 (1977) 24

Mobile, City of, v. Bolden, 446 U.S. 55 (1980) .....*passim*

Moore v. Brown, 448 U.S. 1335 (1980) 12

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TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

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Rogers v. Lodge, 439 U.S. 948 (1978) 2, 5

Sanchez v. McDaniel, 615 F.2d 1023 (C.A. 5th 1980) 42

Snowden v. Hughes, 321 U.S. 1 (1944) 38

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 ..... 23, 24

Toney v. White, 476 F.2d 203 (1973) 27

United States v. Georgia, 436 U.S. 941 (1978) 4

United States v. Supervisors of Forrest County, Mississippi, 571 F.2d 951 (C.A. 5th 1978) 14

United States v. Uvalde School District, 625 F.2d 547 (C.A. 5th 1980) 12, 21, 27, 28, 29

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 38

Washington v. Davis, 426 U.S. 229 (1976) 10, 11, 38

Whitcomb v. Chavis, 403 U.S. 124 (1971) 36

White v. Regester, 412 U.S. 755 (1973) ... 17, 20, 30, 31, 40

Wise v. Lipscomb, 437 U.S. 535 (1978) ..... ii, 8, 29, 42

Zimmer v. McKeithen, 485 F.2d 1297 (C.A. 5th 1973) ..... *passim*

Constitutional Provisions:

Georgia Constitution, §2-5302 37

Georgia Constitution, §2-5501 37

TABLE OF AUTHORITIES—Continued

Page

Statutes:

Ga. Code §23-803 3
Ga. Code §34-605 32
Ga. Code §34-1015 4
Ga. Code §34-1413 4
Ga. Code of 1873, §3906 41
Ga. Laws 1908, p. 27 ..... 23, 40
Ga. Laws 1911, p. 390, 391 ..... 2, 3, 32
Ga. Laws 1929, p. 548 3
Ga. Laws 1931, p. 400 3
Ga. Laws 1964, Ex. Sess., pp. 26, 174 4
Ga. Laws 1970 Vol. I, pp. 347, 380, 369 4
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Note, 25 Emory L.J. 737 23
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No. 80-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals For the Fifth Circuit

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion and judgment of the district court below are unreported, but are found in the Appellants' Jurisdictional Statement (p. 61a et seq.) and record (R. 743, 770).

The opinion of the Court of Appeals is reported as *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981), and is found in Appellants' Jurisdictional Statement (Appendix A., p. 1a).

JURISDICTION

Jurisdiction is based on 28 USCA 1254 (2), the Courts below having declared a statute of the State of Georgia (Ga. Laws 1911, p. 390) to be unconstitutional. The district court entered order on September 29, 1978 (R. 743) and findings of fact and conclusions of law were entered October 26, 1978 (R. 770). This Court granted a stay on November 3, 1978, *Rogers v. Lodge*, 439 U.S. 948 (1978) (R. 806). Notice of appeal was filed October 2, 1978 (R. 747). The Court of Appeals rendered its opinion and judgment on March 20, 1981 (Juris. Stat., p. 1a). Notice of Appeal to this Court was filed on March 25, 1981. This Court noted probable jurisdiction on October 5, 1981.

STATE STATUTE INVOLVED

The statute declared unconstitutional below is as follows:

> "That from and after the passage of this Act, there shall be created and established a Board of Commissioners of Roads and Revenues for the County of Burke in the State of Georgia, consisting of five persons who shall be elected by the qualified voters of said county at the general election to be held on the first Wednesday in October in the year 1912, and at each subsequent, alternate, general election, which election shall be held under the rules, regulations and laws governing the election of county officers in the county of Burke and said five persons shall possess the qualification of being resident freeholders of said County for at least three years prior to said election, shall be at least 28 years of age and eligible to election as a member of the General Assembly of the State of Georgia." (Ga. Laws 1911, pp. 390, 391).

STATEMENT OF THE CASE

This case, instituted on April 5, 1976, by eight black citizens of Burke County, Georgia, against the Commissioners of Burke County and the County Board of Elec-

tions,[1] attacked as an unconstitutional dilution of black voting rights, the at-large system of electing the five Commissioners of Burke County, which had been in effect by law since 1911 (Ga. Laws 1911, p. 390).[2]

According to the 1970 Census, Burke County had 18,255 persons,[3] of whom 10,988, or 60.19%, were black. There were 4,909 white persons of voting age (18 and older) and 5,617 black persons of voting age in the county. Stated differently, blacks constituted 53.36% of the total voting age population. (P.E. 58). In 1978, there were 6,373 persons registered to vote, of whom 2,433 or 38%, were black (D.E. 57, R. 776). (As of 1981, 39.4% of the registered voters are black).

Since 1911, the County has been governed by a board known as the "Board of Commissioners of Burke County." See Ga. Code §23-803. This board was created by the Act of 1911, and has remained in the same form to the present day. The Board consists of five (5) members, elected by all the voters of the County for four year terms. The County has never been divided into districts, either for the purpose of creating residency districts, or for the purpose of having the commissioners elected by the voters in the district. All five commissioners are elected at one

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[1] The action originally was brought against the probate judge rather than the Board of Elections. On learning from the defensive pleadings (R. 22) that the duty of conducting elections in Burke County had been transferred by statute from the Probate Judge to a "Board of Elections" (Ga. Laws 1975 Vol. II, p. 4506), the plaintiffs substituted the latter for the probate judge. Defendant Buxton, whose name appears in the style of the case as it appears in the Court below, was superseded on the Board by Mr. Rogers, who was substituted as a party defendant.

[2] In 1929, the Act was amended to provide for appointment of the 5 commissioners by the grand jury in 1932 (Ga. Laws 1929, p. 548), but before the Act was ever put into effect, it was amended in 1931 so as to revert back to election by the people (Ga. Laws 1931, p. 400).

[3] The chart in footnote 2 of the Court of Appeals' decision is in error, and was the subject of Appellees' Motion for Rehearing.

time, the last elections having been held in 1980.

The Georgia Election Code of 1964 provided that in order to be nominated or elected, candidates were required to receive a majority of the votes cast in the primary or election, and in the event no candidates received a majority in the first primary or election, a runoff was required to be held (Ga. Laws 1964, Ex. Sess., pp. 26, 174). The same act also provided that where two or more public officers having the same title are to be voted on, each candidate must qualify for a specific post or position. (Id., p. 89). These provisions were re-enacted in 1970 (Ga. Laws 1970 Vol. I, pp. 347, 380, 369) and now appear as Code Sections 34-1413 and 34-1015, respectively, and were approved by the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c. See *United States v. Georgia*, 436 U.S. 941 (1978).

Until 1970, the county Democratic Executive Committee conducted primary elections in the County (T2. 99; R. 932). From 1970, the Probate Court (formerly Ordinary) conducted the primaries also (T. 932). See Ga. Laws 1970 Vol. I, p. 347. In 1975, the conduct of all elections was transferred to a three-man Board of Elections (T. 932). See Ga. Laws 1975 Vol. II, p. 4506. Segregation at the polls was abolished in 1964 (T. 933).

There was no evidence that the 1911 county-wide law was enacted with discriminatory intent or purpose, and the district court below held that the enactment of the 1911 Act was "racially neutral when adopted" (R. 776, App. 71a) and "neutral in origin" (R. 791, App. 90a). There was also no evidence that blacks had any difficulty registering, voting or getting on the ballot in Burke County; indeed, the evidence was to the contrary (T. 93-6; 177, 322, 339, 356, 631, 710, 751, 765, 784, 804-6, 468, 851, 884-7, 932, 949-950; T2. 32, T2. 105, T2. 144).

The Court also found to this effect (R. 788, App. 87a).

The district court held that a case of unconstitutional vote dilution had been made out under the criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), aff'd. sub nom *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals."

By way of relief, the district court ordered that a special election be held in the 1978 November General Election then shortly to be held at which five (5) new Commissioners would be elected from single-member districts according to a plan presented by plaintiffs. (The incumbents had been eleteed in 1976 for 4 year terms). On November 3, 1978, this Court granted a stay. *Rogers v. Lodge*, 439 U.S. 948 (1978).

On March 20, 1981, the Court of Appeals affirmed the judgment of the district court, with Judge Henderson dissenting. *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981).

To begin with, the majority opinion recognizes that the decision below must stand or fall on a finding of the "existence of a discriminatory purpose for the maintenance of such a system" (639 F.2d at 1363, f.n. 7). The majority then accuses this Court of misconstruing its 1978 decisions in *Nevett II* and *Bolden* (639 F.2d at 1368, f.n. 22). Then, reviewing the opinions in *Bolden*, supra, the majority concludes that *Bolden* has not changed the law, except to this limited extent:

> (1) The *Zimmer* criteria are rejected only "to the extent that the Court, in Bolden, *presumed* the existence of a discriminatory purpose from the proof of some of those factors" (639 F.2d at 1373). These factors may, however, be sufficient to give rise to an *inference* of discriminatory intent, as distinguished from a *presumption*. (639 F.2d at 1373-1381).

> (2) Regardless of how strong the other circumstantial evidence may be, however, a finding essential to showing a case of unconstitutional dilution is a showing of unresponsiveness by the governing bodies in question to the needs of black citizens. (639 F.2d at 1373).

The majority found additional circumstantial evidentiary support for its holding in the finding below of a depressed socio-economic status (639 F.2d at 1376).

Judge Henderson in dissent declares that *Mobile v. Bolden* has done more than reaffirm the necessity of a showing of discriminatory intent, for it has also abolished the "aggregate of factors approach of Zimmer v. McKeithen . . ."; that the same evidence held insufficient in *Mobile* was relied on by the district court below; and that the judgment should be vacated and remanded for reconsideration in the light of *Mobile*.

SUMMARY OF ARGUMENT

(1) The Court of Appeals erred in holding that the *Zimmer* factors are sufficient to establish a case of unconstitutional discrimination. The district court applied the *Zimmer* criteria, following *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978). The Court of Appeals held that this Court's decision had not rejected the *Zimmer* factors, but only destroyed their efficacy as a *presumption*, while retaining them in full force as the basis for an *inference*. This construction is not supported by the majority opinions in *Bolden*, and represents the fourth time in three years that the Court of Appeals has refused to follow the decisions of this Court in voting cases. The *Zimmer* factors lack merit, as an evidentiary device, because of other valid reasons discussed herein.

(2) In holding that a controlling question now is

whether the governing authority has been responsive to black needs, the Court of Appeals not only misconstrued this Court's decision in *Bolden*, but also violates the rules prohibiting judicial consideration of political questions and judicial inquiry into the wisdom of acts of the law-making body.

(3) The Court's articulation of a new "Zimmer factor", i.e., a depressed socio-economic status, adds no support to the finding of dilution, for at best, this is simply more "impact" type evidence, and is but one aspect of an existing *Zimmer* factor, i.e., "whether the existence of past discrimination in general precludes the effective participation in the election system."

(4) The decision of the Court of Appeals is in conflict with another decision of the same court rendered one month previously, *McMillan v. Escambia County*, 638 F.2d 1239 (C.A. 5th 1981).

(5) This case is not distinguishable on the basis that it followed *Kirksey v. Supervisors*, 554 F.2d 139 (1977). That case does not survive *Bolden;* the *Kirksey* factor of an election system which "perpetuates an existent denial of access" is already one of the four *Zimmer* factors; and violates the rule that the scope of the remedy is governed by the nature of the violation.

(6) *Mobile v. Bolden* is not distinguishable on the ground that there an entire system of government was at issue. The *Mobile* provisions assigning executive responsibilities to each commissioner had not been precleared, and never went into effect. Even so, this Court's opinion addressed the inherent deficiencies of the *Zimmer* approach, and were not limited to an attack on a Commissioner form of government.

(7) Plaintiffs failed to prove a claim under §2 of the Voting Rights Act. Properly construed, that statute also

requires a showing of discriminatory purpose, even assuming that it applies to a voting dilution case.

(8) The dilution doctrine does not apply to county governing bodies. In state legislative apportionment cases, most districts are single-member, and when multi-member districts are involved, they obviously are suspect as being designed to discriminate. Also when only a small political subdivision is involved, there is an identity of interests which justifies at-large perspectives and allegiances.

(9) Even assuming that the *Zimmer* criteria are still valid, dilution was not established by the evidence in this case.

(10) There was no proof of discriminatory purpose in the enactment or retention of the at-large system. Plaintiffs conceded in the district court that there was no discriminatory purpose in enactment, and the district court so found. On appeal, plaintiffs attempted to change their position, but the references they relied on do not support their contention. With respect to retention, plaintiffs relied solely upon the *Zimmer* criteria, while the defendants produced direct evidence showing that the at-large voting plan had never been challenged before, and that it had not been retained for a discriminatory purpose.

(11) The Court below erred in rejecting defendants' plan and ordering plaintiffs' plan into effect simply on a finding that it was "superior". *Wise v. Lipscomb*, 437 U.S. 535 (1978).

(12) Because both parties were aware at the trial of the intentional discrimination requirement, the judgment below should be reversed and the case remanded with directions to the Court below to enter judgment for defendants.

ARGUMENT

(1) The Court Of Appeals Erred In Holding That The *Zimmer* Criteria Are Sufficient To Establish A Case Of Unconstitutional Dilution, And In Refusing, For The Fourth Time, To Follow The Decisions Of This Court

The decision of the district court below was rendered on September 29, 1978 (R. 743, App. 62a; Findings and Opinion, Oct. 26, 1978, R. 770, App. 64a), prior to this Court's decision in *Mobile v. Bolden*, 446 U.S. 55, 64 L.Ed.2d 47 (1980), and was based entirely on the four criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), aff'd. sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals."

The district court specifically found that the 1911 law under attack was "racially neutral when adopted" (R. 776, App. 71a) and "neutral in origin" (R. 791, App. 90a). The district court found also that plaintiffs had not been able to show a "denial of access to specific voting processes" (R. 788, App. 87a). There was no cross appeal from these two findings. The district court also took note of the then recent decision of the Court of Appeals in *Nevett v. Sides*, 571 F.2d 209, 221 (C.A. 5th 1978), holding that "A demonstration of intention is necessary under both fourteenth and fifteenth amendments as a requisite to a finding of unconstitutional vote dilution" (R. 773, App. 68a). However, the Court concluded that this "intent" requirement had not changed the law, and that an inference of intent could be raised by the *Zimmer* criteria (R. 773-4; Juris. Stat. 68a).

The Court of Appeals upheld this reasoning by declaring that the only change wrought by *Mobile v. Bolden*

was that the *Zimmer* criteria no longer were sufficient to raise a *presumption* of *purpose* or intent, but nevertheless survived as a sufficient basis for *inferring* intent or purpose (639 F.2d at 1373, 1375).

The Court did modify this "inference" test to the extent of holding that "An essential element of a prima facie case is proof of unresponsiveness by the public body in question to the group claiming injury" (639 F.2d at 1375).

The decisions of the courts below can not be squared with the majority opinions in *Mobile v. Bolden*. Clearly, this Court held in *Bolden* that the *Zimmer* criteria are no longer sufficient to establish a case of unconstitutional vote dilution. There is not the slightest statement in any of the opinions in *Bolden* to support the presumption -vs- inference distinction discerned by the majority opinion below. Nor is there any basis whatever in the majority opinions of this Court in *Bolden* for the holding of the Court of Appeals that a showing of unresponsiveness is now the controlling issue.

Regardless of other uncertainties arising from the six opinions in *Bolden*, it is not subject to dispute that five justices held that the *Zimmer* approach to proving purposeful discrimination is insufficient. To begin with, the plurality opinion alluded to the fact that *Zimmer* (1973) was decided before *Washington v. Davis*, 426 U.S. 229 (1976) "upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause" (446 U.S. at 71), and concluded that the criteria were not sufficient proof (446 U.S. at 73).

Mr. Justice Stevens' concurring opinion agrees that the "Zimmer analysis should be rejected", but disapproves relying entirely on the question of subjective intent (446 U.S. at 90).

Stated differently, four justices concluded that discriminatory purpose was necessary to show dilution, and that the *Zimmer* criteria were insufficient because they were based on an outdated discriminatory "impact or effect" test developed in the 1973 decision in *Zimmer*. A fourth justice agreed that the *Zimmer* criteria are insufficient, but for a somewhat different reason.

The *Zimmer* case clearly was based on a "discriminatory impact" rationale, for there the Court of Appeals stated the test to be "that designedly *or otherwise*, an apportionment scheme, under the circumstances of a particular case, *would operate* to minimize or cancel out the voting strength of racial or political elements to the voting population . . ." 485 F.2d at 1304 (emphasis supplied). Not only does the language "or otherwise" and "operate" connote impact or effect as distinguished from purpose, but an analysis of the *Zimmer* criteria themselves points toward the same conclusion, for the criteria at best doubtfully give rise to an inference only as to how the voting arrangement *affects* a group, and says nothing of the intent or purpose with which it was adopted or retained. Indeed, only by assumption can it be said that the *effects* derive from the voting arrangement itself, for other factors may and often do cause the effects independently of the at-large election system. In other words, the *Zimmer* criteria are at best weak circumstantial evidence of *effect*, and demonstrate nothing at all as to *intent*.

The decision of the Court of Appeals below represents at least the *fourth time* in *three years* that the Court has refused to follow the decisions of this Court in voting dilution cases. Those four instances are:

1. *NEVETT II:* After *Washington v. Davis*, supra, the Court of Appeals had occasion to consider the question as to what effect the discriminatory intent or purpose

requirement had made on the *Zimmer* criteria. That question was addressed in *Nevett v. Sides*, supra, (Nevett II) decided the same day as *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978), rev'd 446 U.S. 55 (1980).

The Court conceded that a showing of discriminatory purpose was now necessary. 571 F.2d at 219, and that language in *Zimmer* related to impact rather than to purpose (571 F.2d at 225).

Nevertheless, the Court held: "We hold today that a finding of dilution under Zimmer raises an inference of intentional discrimination, and therefore the essential element of intent was present in each of these cases." 571 F.2d at 225. Apparently, the Court of Appeals and the district courts in all prior dilution cases had been finding discriminatory intent without realizing it!

2. *BOLDEN ON REMAND:* Despite this Court's clear holding that *Zimmer* was insufficient, both the District Court and the Court of Appeals on remand, without further findings on intent, reinstated the very district plan previously ordered in the Board of Education case under a *Zimmer* finding, and which this Court had vacated. When Mr. Justice Powell expressed "serious concerns about the process of reasoning underlying the District Court's entry of a preliminary injunction", but nevertheless denied a stay because of peculiar circumstances of timing, *Moore v. Brown*, 448 U.S. 1335 (1980), the Court of Appeals on remand expedited the appeal and vacated the judgment in part.

3. *UVALDE:* Later, in *United States v. Uvalde School District*, 625 F.2d 547 (C.A. 5th 1980) cert. den. 68 L.Ed. 2d 858 (1981), the Court reiterated again its belief that its reasoning in *Bolden* and *Nevett* "survives the Supreme Court's decision intact" (625 F.2d at 553). This was the *third* time.

4. *LODGE V. BUXTON:* Now, for the *fourth* time in this case, the Court of Appeals has refused to follow the decisions of this Court. It has done so by resorting to a facile distinction based upon the difference between an inference and a presumption, a distinction not supported in the least by this Court's decision in *Bolden.*

Once again, the Court of Appeals, in a remarkable coincidence, finds that the district judge anticipated the very decision of this Court 2 years later in *Bolden.* See 639 F.2d at 1375-6. Thus, for the fourth time, the Court of Appeals has refused to respect the decisions of this Court.

Over 100 years ago, this Court declared "Undoubtedly, it is the duty of all inferior courts to yield a prompt obedience to the mandate of this Court . . ." *Ex Parte Howard,* 9 Wall 175, 182 (1870), and more recently, observed that its decisions interpreting the Constitution stand as the "supreme law of the land", binding on all. *Cooper v. Aaron,* 358 U.S. 1, 18 (1958).

The Court of Appeals continues to apply its "disparate impact" doctrine, for in a recent decision, the Court, in an opinion also authored by Judge Fay, held the Florida high school exit examination unconstitutional under equal protection because it produced a disparate impact on black students. *Debra P. v. Turlington,* 664 F.2d 397 (C.A. 5th 1981). See also, the critical comments on denial of rehearing. 654 F.2d 1079, 1084 (1981).

In *Kirksey v. City of Jackson,* 625 F.2d 21 (C.A. 5th 1980), the Court declared that the validity of the *Zimmer* criteria "is now very much in question in light of the recent Supreme Court opinion in City of Mobile . . .", while in *Corder v. Kirksey,* 639 F.2d 1191 (C.A. 5th 1981), the Court took a different view and held that the "substance" of its "approach", i.e., the *Zimmer* criteria, is still valid.

Analytically, however, there are other reasons why the *Zimmer* approach is wrong. Some of these reasons follow:

(a) *Vagueness-Result Oriented.* The very vagueness of the *Zimmer* approach casts a court adrift at sea without any rudder or compass other than its own political philosophy as a guide. It postulates a test so indefinite that if a legislature enacted it into a statute, this Court would promptly strike it down under the void-for-vagueness doctrine. In a comment on the *Zimmer* case written shortly after its release, one commentator pointed out the inherent vagueness of the four criteria, and predicted that they would tend to become a *per se* rule of illegality. See 87 Harv. L.R. 1851, 1859 (1974). This has proven to be a correct assessment.

One has only to compare the decisions in *David v. Garrison*, 553 F.2d 923 (C.A. 5th 1977), and *McGill v. Gadsden Co. Commission*, 535 F.2d 277 (C.A. 5th 1976), rejecting claims of dilution, with such cases as *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951 (C.A. 5th 1978), and *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (C.A. 5th 1977), finding dilution, to appreciate how subjectively amenable to the individual predilections of judges the *Zimmer* criteria are.

(b) *Zimmer Mandates Racial Quotas In Voting.* The Court of Appeals has not only applied *Zimmer* to require single-member districts, but has added thereto the requirement that the districts be deliberately gerrymandered so as to insure "safe" black districts and proportionate racial representation. In *Kirksey*, 554 F.2d at 151, the Court held that lower courts were required to do this. As observed in the plurality opinion in *Bolden* (446 U.S. at 75), a requirement of proportional representation can not be confined to black voters only. It necessarily must apply all over the United States, to Hispanics in Texas, Irish in Massachusetts, and Poles and Germans in Wis-

consin. Nothing could be more devisive than the idea that people, because of their race or nationality, are entitled to special privileges. Such a principle *requires* legislatures to consider race, Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1207, 1260 (1970), and not only exacerbates rather than reduces racial tensions, *University of California Regents v. Bakke*, 438 U.S. 265, 298 (1978), but it is demeaning and insulting to the disadvantaged group by stigmatizing them as being inferior, thereby requiring special treatment. This results in a "quota" approach to voting cases no different from the quotas utilized in some employment discrimination cases.

(c) *The Zimmer Inference Is Illogical.* An obvious fallacy of the *Zimmer* criteria is that the intended inference by no means logically follows from the subsidiary evidentiary findings. The four *Zimmer* findings fail altogether to raise an inference of *intentional* discrimination, and constitute the weakest sort of speculative evidence on the question of "impact". This is particularly true with respect to the *Zimmer* factor relating to the "existence of past discrimination", and the new *Zimmer* factor articulated by the courts below here, i.e., depressed socio-economic status. The fact that some people may unfortunately have been required to attend segregated schools or public accommodations in years gone by does not support the conclusion that they are now denied equal access to participate in the election system. This particular *Zimmer* factor is also peculiarly subject to abuse for it permits a plaintiff to parade before the Court every minor detail of prior discrimination in the history of the area in the expected hope that the revulsion to this unhappy past will somehow obscure analysis and evoke a favorable response based on sympathy rather than reason. It amounts to a judicial dispensation of a type of reparation

for past wrongs, no different in principle than if the Court were to say that because minority children were required to attend segregated schools, they should now be permitted to vote twice in every election.

The findings below are not nearly as strong as those in *Mobile* [See 423 F. Supp. 384 (D.C. Ala. 1976)] which this Court held insufficient. 446 U.S. 55 (1980). Both in *Bolden* and here, plaintiffs were found to have succeeded in establishing the same three *Zimmer* criteria. Here, unlike *Bolden*, there is no evidence whatever that efforts to change the system were defeated by resort to racial arguments. This case was the first effort in Burke County to change the at-large system. The sole means of proving purposeful discrimination in this case was by use of the *Zimmer* criteria, and the added factor of socio-economic deprivation which, as previously shown, is really part of the *Zimmer* factor relating to the effects of past discrimination. There was also evidence in *Bolden* supporting this latter factor. See 423 F. Supp. at 391. In *Bolden*, there was also findings of bloc voting; that the at-large system perpetuated the effects of past discrimination; that blacks had never been elected; and that there had been recent cross burnings and a mock lynching (p. 392).

(2) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions

One of the original *Zimmer* criteria was stated to be "the unresponsiveness of legislators to their particularized interests." 485 F.2d at 1305. As stated, this was one of the four primary criteria. The decision of the Court below now elevates it to controlling significance, for the Court declares that: "Unresponsiveness is a necessary element to a plaintiff's maintenance of an action such as this." (639 F.2d at 1374).

To begin with, nothing in this Court's decision in *Bolden* supports this part of the Court of Appeals' decision. To the contrary, the plurality opinion observed that black citizens discriminated against in jobs and other benefits had their remedies by suing directly for the benefit involved, 466 U.S. at 73, and that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." (466 U.S. at 74).

In this case, plaintiffs launched an exhaustive inquiry into every resolution, vote, program, appropriation, road paving and response made by the Burke County Commissioners during the last 40 years. Some 289 exhibits were introduced by plaintiffs, most of which addressed this issue. The district court's findings devoted some 5 pages to it, (R. 780-784 App. 77a-82a), ranging from committee appointments and road pavings to rejection of federal aid programs benefitting black citizens. While there well may be some language in *White v. Regester*, 412 U.S. 755, 769 (1973) supporting the responsiveness issue, neither this Court nor any lower Court has yet confronted the issue whether judicial inquiry into such a question is precluded by the political question doctrine. If there is anything left of this doctrine, it is difficult to see how any question could be more political in nature, as involving "policy determinations for which judicially manageable standards are lacking." *Baker v. Carr*, 369 U.S. 186, 226 (1962); *Coleman v. Miller*, 307 U.S. 433, 454 (1939). Not only must a court resolve the controversial and partisan question as to what are the legitimate expectations of various segments of the population, but must also adjudicate such questions as priorities, validity of compromises, and whether failure to grant a particular deserved benefit was nevertheless justified for other reasons. Whether a legislative body is responsive or unresponsive to legit-

imate needs of the people is the very question which under our system of government is reserved to the voters. A federal court composed of judges elected by no one and enjoying life tenure is hardly such a broadly-based democratic institution as should be entrusted with such choices.

Even granted that the political question doctrine is "primarily a function of the separation of powers" and hence has stronger application when considered with respect to acts of Congress, *Baker v. Carr*, 369 U.S. 186, 210 (1962), it does not follow that the courts can decide whether legislative action is "wise or desirable", *James v. Strange*, 407 U.S. 128, 133 (1972), for courts do "not strike down laws because they may be unwise, improvident or out of harmony with a particular school of thought," and "We should not forget that legislatures are ultimately guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Maher v. Roe*, 432 U.S. 464, 479 (1977). Whatever the ultimate validity of county-wide voting, its constitutionality should not be made to depend on a court's political opinions.

(3) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution

The Court of Appeals gives as one additional reason for its affirmance, the fact that the district court also relied on another factor, a depressed socio-economic status, referring to this as "a similar factor" (639 F.2d at 1376).

To begin with, this Court has never held that just because an identifiable segment of the population is disadvantaged economically or socially as compared to another group, this entitles the former to some special dispensation in the area of voting rights. Of course, a citizen can not be deprived of the right to vote because he owns no property. *Cipriano v. Houma*, 395 U.S. 701 (1969); *Hill v. Stone*, 421 U.S. 289 (1975). The question here, of course,

is not whether poverty or social deprivation can be penalized, but whether the state is required to discriminate in favor of its victims because of the condition.

With respect to the matter at issue here, blacks are not the minority. They constitute 60.19% of the total population according to the 1970 census, and 53.39% of the voting age population. In Burke County, they have only to register and vote, and they could control all elections. The undisputed evidence here is that blacks have suffered no difficulty in registering, voting or running for office. Every witness presented by plaintiffs, without exception, testified to this effect.

Moreover, a depressed socio-economic status is at best simply more of the "impact" or "effect" type evidence which the Court of Appeals seems to be so preoccupied with. Even here, it is a long jump to infer discrimination in political access from the fact that one group has less money or social standing than another.

Lastly, the fact of a depressed socio-economic status seems to be but one part of the *Zimmer* primary factor which deals with whether "the existence of past discrimination in general precludes the effective participation in the election system." *Zimmer*, supra, 485 F.2d at 1305. Consequently, it is more properly treated as one constituent element of this primary factor, and should not be elevated to separate status in order artificially to bolster an otherwise deficient evidentiary showing. This very approach has characterized the application of the *Zimmer* criteria by the Court of Appeals. In this respect, it should be recalled that two of the criteria deal with "access to the process of slating candidates" and whether "the existence of past discrimination in general precludes the effective participation in the election system" (485 F.2d at 1305). As utilized by the Court of Appeals, the latter factor has tended to gobble up the former, and a finding

on the discrimination factor is also taken as establishing the slating factor. In this case as in *Bolden*, the Court of Appeals was confronted with the undisputed fact that blacks do have equal access to the slating of candidates in the sense that this term was utilized in *White v. Regester*, 412 U.S. 755, 766-7.[4] Confronted also with the fact that no such evidence existed in either this case or the *Mobile* case, the Court of Appeals nevertheless resolved the slating factor in favor of plaintiffs by referring to past discrimination and its alleged inhibiting effects on present participation. *Bolden*, supra, 571 F.2d at p. 243; *Lodge v. Buxton*, supra, 639 F.2d at 1379. In the plurality opinion in *Bolden*, this inconsistency of the Court of Appeals was noted.[5]

Depressed socio-economic status, even when added to the other *Zimmer* factors, does not make out a case of unconstitutional dilution.

(4) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court

Not only does the decision below fail to follow the controlling decisions of this Court, it is in direct conflict with a decision of another panel of the same court decided one month earlier. In *McMillan v. Escambia County*, 638 F.2d 1239 (C.A. 5th 1981), another panel of the Fifth Circuit, reached exactly the opposite result, declaring that "*Zimmer v. McKeithen* has been invalidated by *Bolden*," 638

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[4] Referring to the district court findings, this Court in White v. Regester alluded to the fact that only 2 Negroes had ever been "slated by the Dallas Committee for Responsible Government (DCRG), a white dominated organization that is in effective control of Democratic Party slating in Dallas County." (Id.).

[5] "On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance." (446 U.S. at 71).

F.2d at 1247, f.n. 16, and that the *Zimmer* factors of whether whites campaign for black votes and whether people in elective positions are responsive to minority needs, are no longer relevant. (638 F.2d at 1248.) The *McMillan* case, it is submitted, represents the proper approach to dilution cases, for it focuses upon whether (1) There was evidence of discriminatory intent in enactment, and (2) Whether subsequent thereto efforts to change the law were defeated by racially inspired arguments.

Also, in *United States v. Uvalde School Dist.*, 625 F.2d 547 (C.A. 5th 1980), cert. den. 68 L.Ed.2d 858 (1981), one panel of the Court of Appeals held that the 15th amendment reaches a dilution claim, whereas another panel held to the contrary in the *McMillan* case, supra.

(5) The Decision Below Is Not Sustainable Under *Kirksey*, 554 F.2d 139

The United States filed an *Amicus Curiae* brief in the Court of Appeals attempting to distinguish this case on the reasoning that the district court below followed *Kirksey v. Supervisors*, 554 F.2d 139 (C.A. 5th 1977), and that *Kirksey* was not discredited by *Mobile v. Bolden*, 446 U.S. 55 (1980). This argument seizes upon language in *Kirksey* condemning an election plan which "perpetuates an existent denial of access to the political process" (554 F.2d at 142), and pointing to the findings below of past discrimination, the government urges that as in the school segregation cases, once a *de jure* violation is shown, a continuing duty arises to eradicate the effects thereof, and where discriminatory impact is seen to flow from a practice, that practice is invalid as perpetuating the effects of prior discrimination without having to show a discriminatory purpose. In other words, it is contended that this is a *remedy* case and not a *violation* case. This

argument is not valid for several reasons.

First, it is said that *Bolden* did not reject *Kirksey*. *Kirksey* was necessarily disapproved because in *Bolden*, the district court had made the same findings of massive discrimination in the past which the Court found operated to effectively deny political participation in the present,[6] and the Court of Appeals in its opinion in *Bolden* expressly adopted the *Kirksey* rationale, referring to the fact that it must be shown that "enough of the incidents of the past have been removed, and the effects of past denial of access dissipated . . . (citing *Kirksey*) . . ." (571 F.2d at 245), and condemning "an innocently formulated plan that perpetuates past intentional "discrimination . . ." citing *Kirksey* again (p. 245-6). Consequently, the Court of Appeals in *Bolden* specifically invoked the very *Kirksey* principle asserted here, and it did not survive judgment in this Court.

Second, the Government's contention would reduce the 4 *Zimmer* factors to only one. Under *Zimmer*, one of the four primary factors was stated to be, whether the "existence of past discrimination in general precludes the effective participation in the election system" (*Zimmer*, 485 F.2d at 1305).

This *Zimmer* factor is precisely the same holding of *Kirksey* which the Government erroneously says is a "new" approach. It is already one of the 4 *Zimmer* factors. The Government's position would now elevate this factor, originally one of the four in *Zimmer*, to the *only* factor that need be considered.

Certainly, if this factor plus 3 others were held insufficient in *Bolden*, it alone can not be sufficient now.

Third, the Government's argument is not supportable

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[6] See *Bolden v. City of Mobile*, 423 F. Supp. 384, at 387, 398, 401.

by the school case analogy, where current segregation is presumed to be the result of prior discrimination in a system found to have been guilty of *de jure* segregation. This analogy does not stand up. The Georgia grandfather clause expired in 1915 (Ga. Laws 1908, pp. 27, 29; Art. II, Sec. I, Par. II, Const. of 1877). The white primary was abolished in 1945. Once these laws and practices were abolished, they were at an end. There was no continuing illegal system in the same sense as a school system with segregated classes or faculty, which the state was under a continuing affirmative duty to eradicate. Otherwise, courts would be empowered to declare void laws which are not invalid themselves but simply because of past "societal discrimination." Such a proposition would invalidate numerous laws in all walks of life based simply on impact. *Goodman*, 60 Cal. L.R. 275, 300 (1972). Arguably, all "impact" can be traced to past discrimination in ages gone by. Note, 25 Emory L.J. 737. This Court flatly rejected this "polluted stream" or "original sin" doctrine in *Bolden* (446 U.S. at 74), and Mr. Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 307, 310 (1978), points out that the Constitution does not justify reverse discrimination on the basis of such an amorphous concept as "societal discrimination." Such a proposition would support reverse discrimination for all time to come.

Fourth, the Government's position violates the principle that the nature of the violation determines the scope of the remedy. The constitutional violation asserted in this case was not school segregation, employment discrimination, or some other form of segregation, but *at-large voting*, which was alleged to violate the Constitution, and it was this which the suit sought to enjoin.

Constitutional violations in other areas do not authorize relief related to voting. As stated in *Swann v. Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 16: ". . . it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation . . . and * * * As with any equity case, *the nature of the violation* determines the *scope of the remedy*." In *Milliken II* [(*Milliken v. Bradley*, 433 U.S. 267, 280, 282 (1977),] the Court held that: "The remedy must therefore be related to the condition alleged to offend the Constitution," and, "Federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."

These same principles were followed in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) where the Court rejected findings below that tended to view the present structure of the Dayton School System as a "sort of fruit of the poisonous tree." (433 U.S. at 417). The Court reiterated that the remedy must be "tailored to fit the nature and extent of the constitutional violation." (433 U.S. at 420). Otherwise, a constitutional violation once found in one area would support remedial action in a whole gamut of unrelated activities.

The plurality and concurring opinions in *Bolden* necessarily rejected this argument. Otherwise, the judgment below, which followed the *Kirksey* rationale, would not have been vacated.

Fifth, *Kirksey* is itself distinguishable, and affords no precedent for an at-large case such as is presented here. *Kirksey* was not an at-large dilution case, but a racial gerrymander case involving a districting scheme which fragmented the black vote concentrated in the central city area by pie-shaped districts, "a stark pattern, unexplainable on grounds other than race" (554 F.2d at 148). *Kirksey* also involved an attack on a plan recently enacted in the context of an existing reapportionment case in a jurisdiction where federal voting registrars had

been appointed only a few years before (Id., p. 152). Here, the law had been in effect since 1911, and Burke County had no prior history of discriminatory voting practices.

(6) *Mobile v. Bolden* Is Not Distinguishable On The Ground That An Entire System Of Government Was At Issue In That Case

Plaintiffs argue that in *Mobile*, an entire system of government was under attack in that under Mobile's commissioner form of government, each commissioner had certain executive responsibilities, whereas here, it is said only at-large voting was involved.

This distinction is not valid for 2 reasons:

First, an entire governmental structure was not in issue in *Mobile*, because the Commissioner-role amendment was not adopted until 1965, after the Voting Rights Act. The 1965 Amendment had never been precleared under §5 (42 USCA 1973c) [7] and hence it never went into effect and was not a valid law such as could create a "governmental structure."

Second, the reasoning of this Court's opinions negate any such construction.

The plurality opinion deals separately with the two *Zimmer* criteria mainly relied on both in *Mobile* and this case, i.e., history of past discrimination, and unresponsiveness, aggravated by bloc voting and lack of black success at the polls.

As to this failure to elect blacks, the Court declared that the findings made clear that Negroes register and vote in Mobile without hindrance, and that there are no

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[7] This failure to obtain preclearance was recognized at every level. See 423 F. Supp. 384 at 386, f.n. 2; 571 F.2d 238, at pp. 241, 246, and 446 U.S. at 59, f.n. 6.

official obstacles in the way of Negroes who wish to become candidates for election . . ."; and noted, as here (T. 886; T2. 107; T2. 146), that the only slating organization in the City is comprised of blacks, and concluded: "It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation". (446 U.S. at 73).

With respect to responsiveness, the Court declared that assuming that blacks were discriminated against with respect to employment and services, "those discriminated against may be entitled to relief under the Constitution albeit of a sort quite different from that sought in the present case" (446 U.S. at 73).

With respect to the history of official discrimination in Alabama, the Court remarked that,

> "But past discrimination can not, in the manner of original sin, condemn governmental action that is not itself unlawful." (446 U.S. at 74).

Mr. Justice Stevens' concurring opinion, which makes up the majority holding, treated the issues in the context solely of at-large voting. He alluded to the fact that Mobile's basic election system "is the same as that followed by literally thousands of municipalities and other governmental units throughout the nation" (446 U.S. at 92), an obvious reference to footnote 7 of the plurality opinion which pointed out that most municipalities of over 25,000 people utilize the at-large election system (446 U.S. at 60).

The plurality and concurring opinion rejected outright the *Zimmer* approach, without regard to the commission-type government question.

(7) No Claim Under Section 2 Of The Voting Rights Act Was Shown, For It Also Requires A Showing Of Discriminatory Purpose

Both plaintiffs and the United States relied in the Court

of Appeals upon Section 2 of the Voting Rights Act of 1965, 42 USCA 1973, which declares: "No voting qualification or prerequisite to voting, or standard, practice, or procedure can be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, [or in contravention of the guarantees set forth in section 1973b(f)(2) of this title]." (matter in brackets added by 1975 amendment).

Plaintiffs say that only a plurality in the *Mobile* case took the position that §2 is not satisfied by discriminatory impact evidence. While Mr. Justice Stevens' concurring opinion did not mention the statutory claim rejected by the plurality, it is obvious that he is in agreement therewith, for otherwise, he and the four dissenting members of the Court would have constituted a majority of justices, thereby affirming the decision of the Court of Appeals.

Despite dicta in *Toney v. White*, 476 F.2d 203, 207 (1973), the Court of Appeals in *Nevett II* declared that: ". . . this court knows of no successful dilution claim expressly founded on 42 USCA 1973" (571 F.2d at 242, f.n. 3).

Both in *Uvalde*, 625 F.2d 547 (1980), cert. den. 68 L.Ed. 2d 858 (1981), and here, (639 F.2d at 1372) the panels held that both the 15th Amendment and §2 would reach a case of voting dilution, but that intentional and purposeful discrimination must be shown, while *McMillan v. Escambia County*, 638 F.2d 1239, 1243 (C.A. 5th 1981), held that neither applied to dilution cases.

In *Bolden*, the plurality opinion held that Section 2 "was intended to have an effect no different from that of the Fifteenth Amendment" and that it "adds nothing to the appellee's Fifteenth Amendment claim" (446 U.S. at 61), and that under the Fifteenth Amendment (a) Discriminatory intent or purpose must be shown (446 U.S.

at 62) and (b) That the Fifteenth Amendment reaches only a denial of the right to vote and does not affect at-large voting at all (446 U.S. at 65).

Mr. Justice Blackmun did not address the issue. Mr. Justice Stevens felt that the Fifteenth Amendment does apply (446 U.S. at 84), and Justices Marshall and Brennan seem to agree.

Regardless of whether §2 reaches a dilution claim, it is certain that a majority did not consider that it would suffice to establish a claim under the proof adduced in this case, proof which clearly was not as strong as that presented in *Bolden*. See 423 F. Supp. 384.

In any event, all cases at least require a showing of intentional discrimination, and since plaintiffs' 14th Amendment argument fails on that point, so also must its 15th Amendment and §2 argument fail.

The Government argues that Congress did not intend any difference in standards between §2 (42 USCA 1973) and §5 (42 USCA 1973c), and hence, discriminatory impact should be sufficient under §2 just as it has been held to be under §5.

The Court of Appeals has already answered this question to the contrary in *Uvalde*, just as a plurality and in effect a majority of this Court did in *Bolden*. In Section 5, Congress specifically used the terms "purpose *and effect*", 42 USCA 1973c, (as it did in §4, 42 USCA 1973b), whereas it omitted reference to any "effect" or "impact" language in §2, but used instead the same grammatical structure as the Fifteenth and Fourteenth Amendments.

Secondly, Congress was dealing with a different thing in §2 altogether. There, Congress was stating a proposition applicable to all parts of the country, while in §5, it was dealing with *changes* in particular areas which because of past conduct raised at least a suspicion of ulterior

motives, and where it was obviously desired to impose a stricter standard. The Court of Appeals recognized in *Uvalde* that one "cannot assume that each of the sections is designed to reach the same objective or is necessarily to be read in the same manner". 625 F.2d at 550.

It was also urged by plaintiffs below that §2 does not use the terms "intent" or "purpose". Neither does the 14th Amendment, but it, like §2, uses the terms "deny or abridge" and they have been construed as requiring a showing of "intent" or "purpose" under the 14th Amendment. Lastly, it is submitted that a discriminatory intent requirement is to be preferred. The Second Circuit has held recently that discriminatory intent is required under Title 6, thereby superseding *Lau v. Nichols*, 414 U.S. 563 (1974). *Lora v. Bd. of Educators*, 623 F.2d 248 (C.A. 2nd 1980).

(8) The Dilution Doctrine Does Not Apply To County Governing Bodies

In *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978), four justices expressed doubt that the dilution doctrine applies to the governing bodies of political subdivisions.

This issue was raised and asserted by defendants in this case (T. 252).

There are clear differences. To begin with, in state legislative seat cases, most of the districts are almost always single member districts, so when a multi-member district is included, the question naturally arises as to why should some districts be different? The very fact of their difference makes them suspect. *Second*, the very purpose of state legislative apportionment is to accord representation to the differing elements of a large geographical area. This is not so when only a county is involved, particularly one no larger geographically or population-wise than Burke County. There are valid reasons why a county-

wide allegiance is desirable in a small elected public body having a greater identity of problems than in a state-wide governing body. See Note, 87 Harv. L.R. 1851, 1857 (1974).

(9) Even Assuming The Validity Of The *Zimmer* Criteria, Dilution Was Not Established In This Case

Even under the *Zimmer* criteria, the evidence does not support a finding of dilution.

(a) *Access To The Slating Process*

The Court below confused two of the *Zimmer* factors by holding, in effect, that satisfaction of the factor relating to a showing of continuing effects of prior discrimination also establishes lack of access to slating (Juris. Stat., p. 85a). "Slating", as used in the *Zimmer* formula, means just what it says—the process of selecting candidates and getting them on the ballot. See *White v. Regester*, 412 U.S. 755, 766 (1973), and *McGill v. Gadsden County Commission*, 535 F.2d 277, 280 (C.A. 5th 1976). The slating factor is distinct from the separate *Zimmer* factor of the continuing effects of past discrimination. Otherwise, there would be only 3 and not 4 *Zimmer* factors.

As in *Mobile*, there also are no formal slating arrangements in Burke County, no political organization through whom candidacies are cleared, and all the candidate has to do is to sign up with the party and pay a small fee (Lewis, T2. 145-6; Marchman, T2. 246; Buxton, T. 824; Thompson, T. 844-8; Webster, T2. 27; Harden, T2. 102, 106; Lewis, T2. 145-6). The Committee itself does not solicit candidates (T2. 110).

In fact, it appears that blacks are better organized politically than whites, for while there are no white political organizations which endorse candidates (Lewis T2. 146-7), there are at least two black organizations which conduct

meetings, endorse candidates, and one of them publishes a "ticket" for elections (Lewis T2. 146-8; Marchman, T2. 250; Lodge T. 716-721, 751-3, 761-1; Thompson, T. 886; Harden, T. 107-108).

Essentially, the sole basis for the court's finding on the slating issue was that blacks had been excluded from the local Democratic Executive Committee (T. 788, Juris. Stat. 87a). The Court of Appeals approved this finding. 639 F.2d at 1378. There was no evidence at all supporting the finding that blacks had been excluded from the Democratic Executive Committee. The evidence showed that these positions were not appointed, but were elected by the people in the Democratic primary; that widespread announcements of the election therefor were given in the newspapers and radio, and that little interest was exhibited by whites or blacks. (T2. 99, 109-110, 148-150; T. 542, 894-5). It is hardly correct to say that blacks have been "excluded" when the positions are elected and blacks simply do not offer. It is rather strange that after having held that the failure of blacks to elect county commissioners proportionate to their numbers did not show discrimination, the District Court and the Court of Appeals here both seem to conclude just the contrary with respect to the local Democratic Executive Committee which, it happens, is elected on the single-member district basis that the plaintiffs are asking for in this case (T. 891)! The district court's finding with respect to the political access factor is clear error, for under *White v. Regester*, 412 U.S. 755, 765-6 (1973), the fact that a minority has not elected its candidates in proportion to its voting potential does not show discrimination. The Court of Appeals in this case paid lip service to this proposition (639 F.2d at 1362), but completely disregarded it in failing to set aside the district court's finding on the political access question.

The Court below also found that a freeholder requirement for registrars precluded black participation (T. 779, Juris. Stat., p. 75a). However, this law (Ga. Code §34-605) had been repealed prior to the filing of this suit. This finding therefore was error.

The Court also found, and the Court of Appeals reiterated it (639 F.2d at 1377), that the County only established new registration sites following "friendly persuasion" by the Court at a pretrial conference (T. 783, Juris. Stat., p. 81a).

This is incorrect. These sites were established on February 10, 1976 (D.E. 4) before this case was filed on April 5, 1976, and many months before the first pretrial conference was held on March 4, 1977.

(b) *Tenous State Policy Underlying The At-Large System*

This factor (see *Zimmer*, 485 F.2d at 1305) must be resolved in favor of defendants. The district court merely declared that this factor was "neutral" (R. 790; Juris. Stat. 90a). The evidence, however, shows that there was a long standing policy favoring county-wide voting in Burke County for the system had been in effect since 1911 (See Ga. Laws 1911, p. 390). Also, defendants called attention to laws in ten adjoining counties which provided for the election of local governing bodies on an at-large basis. See Defendants' Trial Brief (R. 689). As pointed out in *Mobile*, supra, at-large elections in political subdivisions have long been considered a desirable method. 446 U.S. at 70, f.n. 15. Most municipalities of over 25,000 people elect on an at-large basis (Id. at 60, f.n. 7), and it is a method followed by "literally thousands of municipalities and other governmental units." Id. at 92 (Justice Stevens, concurring). Of the 50 largest school boards in the United States, 30 use at-large elections. *Black Voters*

v. McDonough, 565 F.2d 1, 2 (C.A. 1st 1977). Here, valid reasons supporting use of the at-large system were testified to in full. (Hardin, T2. 101-103, 113; Thompson, T. 882, 910-911; Lewis, T2. 141-144).

(c) *Existence Of Past Discrimination Which Precludes Effective Participation*

The Court below resolved this factor in favor of plaintiffs (R. 775; Juris. Stat. 71a).

It is certainly no secret that Georgia laws previously mandated racial segregation in such areas as education and public transportation, just as litigation conducted during the last few years had demonstrated that in most other areas of the United States, racial discrimination has been practiced covertly.

This being a voting case, however, the important question is to what extent this precludes effective participation today. As stated in *McGill v. Gadsden County Commission*, 535 F.2d 277, 281 (C.A. 5th 1976), "The key question, however, is whether 'the existence of past discrimination in general precludes the effective participation [of blacks] in the election system' today. *Zimmer*, 485 F.2d at 1305."

The undisputed evidence here was that blacks had no difficulty in registering, voting or running for office in Burke County. All of plaintiffs' black witnesses testified to this fact: Rev. John Ellis (T. 93-6), D.E. 28; Mrs. Dorothy Lattimore (T. 151); Woodrow Harvey (T. 312, 322-3, 326), D.E. 26; Gloria Sullivan (T. 339); Mary Frances Laurant (T. 356); Ruth Jones (T. 631); Herman Lodge (T. 712-15), D.E. 25.

The Court below specifically found that plaintiffs were "unable to show a denial of access to specific voting processes, similar to the obviously egregious denials in Kirksey . . ." (T. 788, Juris. Stat., p. 87a).

Registration cards for black citizens were produced as far back as 1946 (D.E. 53, 36, 37, 40-46).

There was no evidence that voting registrars had ever been appointed for Burke County, cf. *Kirksey*, 554 F.2d at 152, or that any litigation had ever been brought complaining of a denial of the right to register or vote.

All of defendants' witnesses testified that blacks had never experienced any difficulty in registering or in voting. (May, T. 765; Chappell, T. 784-7; Dinkins, T. 804-6; Bunn, T. 846; Walker, T. 851-3; Thompson, T. 884, 887; Herrington, T. 932-3; McNair, T. 949-50; Webster, T2. 32; Harden T2. 105; Lewis, T2. 144).

It also appears without dispute that white candidates actively solicit black votes (Dinkins, T. 805; Buxton, T. 823; Thompson, T. 881; Webster, T2. 30; Lewis, T. 139-140).

Plaintiffs attempted to show that one black witness, Rev. John Ellis, experienced difficulty in registering in 1960 because he had to go to the Courthouse 3 times (T. 71). However, the undisputed testimony was that at this time, registration was conducted only on certain days, and all applicants were required to make an application one day, and return on another day to complete registration before the registrars (Chappell, T. 785; Dinkins, T. 802). More significantly, it appears that Rev. Ellis was permitted to register although he did not move to Georgia until 1960 (T. 69) and was registered on September 21, 1960, before he had completed the one year residency required under the 1945 Constitution (Ga. Laws 1945, pp. 8, 15) in effect at that time (D.E. 28), hardly a case of discrimination.

Plaintiffs point to the fact that until the Voting Rights Act, Georgia enforced a literacy test. However, there was no evidence that it had ever been enforced in a discrimi-

natory fashion, and it should be recalled here that this test was not unconstitutional. *Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959).

Even so, the undisputed evidence is that in Burke County, the test was fairly administered. Mrs. Winnie Chappell testified that she worked in the Tax Commissioner's office from 1952 to 1974; that she administered the test equally to all (T. 782-4) and that she doesn't recall any applicant being refused registration because of inability to pass the test (T. 784). Mrs. John T. Dinkins, who was Tax Commissioner from 1957 to 1971, and who worked in the office with her husband before then (T. 801), testified that she was never aware of any black persons being refused registration on the basis of the literacy test (T. 802). None of this evidence was contradicted.

In 1975, black citizens, including plaintiff Lodge, requested that the Commissioners establish additional registration sites (P.E. 102). This request was granted, and the Commissioners established three new registration sites (D.E. 4; T. 733), although it also appears that only a relatively few voters registered at the three new sites (T. 847, 851).

(d) *Responsiveness Of The County Commissioners To The Needs Of Blacks*

The district court resolved this issue adversely to defendants (R. 780; Juris. Stat. 77a). A fair statement of the evidence is that the Commissioners approved some of the things desired by blacks, and rejected others. Assuming that this is a valid consideration for judicial consideration (see part 2 of Argument, *supra*), it is submitted that it must have reference to an egregious, wanton disregard of black needs. Otherwise, the Courts are placed in the position of awarding drastic relief based simply on a fine weighing of political fortunes. In any democracy,

no group can expect to get everything it asks for.

In this case, there was testimony as to at least 10 health programs conducted by the county which principally favors blacks (Glisson, T. 961, T2. 26). County Administrator Hopper testified to the number of appointed black officials in the County (T2. 188-197). The Board advertises job openings, but few blacks apply (T2. 184-186). He testified with respect to the county recreation plan which largely benefits blacks (T2. 194) and some eight programs which mainly benefit blacks (T2. 197-210). The district court placed great emphasis on a finding that roads in certain black areas had not been paved, although conceding that this evidence was not presented with "precision or complete clarity" (R. 782; Juris. Stat. 79a). Mr. Hopper testified, however, to a number of roads in black areas which had been paved in the last few years (T2. 208-210), and further pointed out that there are a total of some 640 miles of unpaved roads in the county (T2. 208). He identified some 15 unpaved roads which serve mainly white people (T2. 212-216). Most of the examples relied on by the Court as showing arbitrary road preferences in favor of whites were in fact "political" roads provided by past governors to their supporters, and were not roads dispensed by the Commissioners (T2. 216-217).

(e) *The Enhancing Factors*

The four enhancing factors were divided equally, there being a majority vote requirement and no districting requirement for residency purposes, but the district is not large and there is no single-shot voting provision. In holding that the Burke County election district is large, containing 832 square miles (R. 791, Juris. Stat. 91a), the district court clearly erred, as did the Court of Appeals. 639 F.2d at 1380. The reference to "size" in *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971), was clearly directed mainly toward the number of *persons* and *positions*, which

cause voter confusion. That is certainly the interpretation placed on this factor in *David v. Garrison*, 553 F.2d 923, 929 (C.A. 5th 1977). Burke County is neither large geographically nor population-wise. It had only 18,255 persons according to the 1970 Census. This is less people than are represented by a single member of the Georgia House of Representatives (25,500) and less than one-fourth the average number of persons represented by a State Senator (81,964). As far as the County's geographic size, it is less than a square with 29 miles on each side. The fact that it is one of the largest counties in Georgia geographically means little when it is considered that Georgia has 159 counties.

(f) *Other Errors In The Court's Findings*

(i) *Segregated Schools*

Much ado was said about segregation in the school system. While the evidence showed that what segregation existed was in small isolated schools under conditions approved by a federal court order (D.E. 55, T2. 86), the fact is that the county commissioners have nothing to do with the school system, which is under the complete control of a separate Board of Education vested with plenary power by the State Constitution, Art. VIII, Sec. V, Par. II (§2-5302), including the authority to levy the local taxes necessary therefor. Art. VIII, Sec. VII, Par. I (§2-5501). Acts of a separate governing body, approved by a federal court, can not be imputed to the Commissioners. *Milliken v. Bradley*, 418 U.S. 717, 748 (1974).

(ii) *Band Uniforms*

The Court below found that the Commissioners donated public money to buy band uniforms for the private school (R. 784, Juris. Stat. p. 82a). To the contrary, the evidence was that the Commissioners *refused* to contribute county money to the *public* high school band because

such funds could not legally be used for such purposes (T2. 84, 150, P.E. 37).

(10) There Was No Proof Of Discriminatory Purpose In The Enactment Or Retention Of The At-Large System

"A discriminatory purpose is not presumed . . . there must be a showing of clear and intentional discrimination," *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), "The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," *Washington v. Davis*, 426 U.S. 229, 240 (1976), and in a case of this type, "A plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." *Mobile v. Bolden*, 446 U.S. 55, 66 (1980). "[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose", and "discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. * * * It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 279 (1979). Even where discriminatory purpose was part of the motivation for governmental action, the defendant may defend by showing that the decision would have been reached anyway for other, valid reasons. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 274 (1977) (f.n. 21).

The district court below found that the at-large system here was not enacted for a discriminatory purpose (R. 776, 791; Juris. Stat. pp. 71a, 90a). There was no cross

appeal by plaintiffs from this finding, and hence it became the law of the case. The sole basis of the decision below was that discriminatory purpose was established in the *retention* of the system (R. 776; Juris. Stat. 71a).

(a) *Retention*

The sole means employed by plaintiffs to prove discriminatory purpose in retention were the *Zimmer* criteria, and they made no effort to adduce any *direct* or *other* evidence showing discriminatory purpose in retention, despite extensive discovery (T. 56, 189, 192, 196, 216, 246, 331, 333, 361, 364), and voluminous evidence, consisting of 761 pages of direct testimony and 289 exhibits. On the other hand, defendants adduced substantial evidence going directly to the point, and showing that there was no discriminatory purpose involved in the retention of the system. This testimony stands unrefuted: Preston Lewis testified that he had served in the House of Representatives from Burke County for 12 years from 1960, and 2 years in the State Senate, longer than any living person, and that district voting had never been an issue, and had never even been suggested until this suit was filed (T2. 137-140, 163). He also testified that he preferred county-wide voting because it avoids the ward system of political deals and trades, and because the county was so small population-wise, it is not difficult for voters to know all the candidates (T. 141). District elections create confusion because voters have difficulty knowing which district they are in. Also, voters register and vote by militia districts, the basis upon which land records are kept (Ga. Code Chap. 23-2) and elect Justices of the Peace by Militia District (Ga. Code, Chap. 24-4); if the county were districted for Commission election purposes, militia districts would have to be crossed with the result that each polling place would have to have 2 ballot boxes and some voters would have to vote at 2 places

(T. 142-4). Other witnesses testified to the same effect. (Harden, T. 101-103; Webster, T2. 32; Thompson, T. 880-2, 911). Mr. Thompson, the Chairman of the Democratic Executive Committee, also stated that districting necessitates redrawing of the district lines after each census (T. 911), thereby generating political controversy every 10 years.

The burden of proof on this issue was on the plaintiffs, *White v. Regester*, 412 U.S. 755 (1973), and they failed to carry it.

(b) *Enactment*

When this case reached the Court of Appeals, plaintiffs changed their position and attempted to argue that the 1911 law was motivated by a discriminatory purpose. The reason was, of course, that this Court's decision in *Mobile* had in the interim destroyed the basis of the district court's opinion. Defendants contend that the district court's finding of no discriminatory purpose in enactment establishes the law of this case on that issue, but will nevertheless address the question briefly here.

Plaintiffs conceded below that there was no discriminatory purpose in the enactment of the law, since a 1908 constitutional amendment adopting a grandfather clause (Ga. Laws 1908, p. 27), had already disfranchised most blacks (R. 154),[8] and hence, as noted in *David v. Garrison*, 553 F.2d 923, 930 (C.A. 5th 1977), there was no need to resort to at-large voting to disadvantage blacks.

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[8] It is very easy in 1981 to look back and condemn this law as a malevolent act of brutal discrimination. The truth is, however, that it was not directed at the Negro but at the widespread vote frauds involving the buying of black votes with whiskey and money, and the wholesale hauling of black voters from county to county. Grantham, Georgia Politics and The Disfranchisement of the Negro, 32 Ga. Hist. Qtly. 1 (1948); Arnett, The Populist Movement In Georgia, 7 Ga. Hist. Qtly. 313, 332 (1923); Coulter, A Short History, p. 393 (1947); Atlanta Constitution, Nov. 8, (1894).

In the Court of Appeals, however, plaintiffs related the history of the 1908 amendment and cited statements made during its adoption in such a misleading way as to suggest that these statements and sentiments prompted passage of the 1911 law creating the Board of Commissioners in Burke County. (Brief, pp. 31-34). This is not the case. No such legislative history exists. Plaintiffs also implied that Burke County citizens ousted the 3 black representatives from the General Assembly during reconstruction, and that one black legislator from Burke County was killed (Brief, p. 31). There is no basis for such inferences. Since all of Burke County's 3 representatives were Negro, there could have been no Burke County whites in the legislature to participate in the ouster, and the black legislator was in fact killed by another black. *Young*, The Negro in Georgia Politics, 1867-1877, Unpublished Thesis, Emory University Library, Atlanta, September 15, 1955, pp. 49-50).

Plaintiffs also argued below that in 1873, Burke County changed its county government from the Ordinary, who was elected county-wide at a time when blacks were voting, to a Board of Commissioners of Roads and Revenues who were appointed by the Grand Jury at a time when blacks did not serve on grand juries. This is not correct. In 1873, blacks were eligible for grand jury service. Code of 1873, §3906. Consequently, no inference can be drawn that the 1873 act was inspired by discriminatory intent. Moreover, *Young* points out that by 1870, Reconstruction had been completed; and the black vote ceased to be a factor in elections. *Young*, Id., p. 106. Moreover, the question here relates to the motivation behind the 1911 law, not the 1873 law. The obvious motivation for the 1911 law was the preference for popular election of officials which was sweeping the United States during the early 1900's.

(11) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act

The district court rejected defendants' plan not because it was invalid, but because plaintiffs' was "superior" (R. 796; Juris. Stat. 96a).

In a case attacking a districting device as being unconstitutional, the Court should not itself devise a new plan, but should permit the body an opportunity to devise its own plan and submit it under Section 5 of the Voting Rights Act for preclearance. *Wise v. Lipscomb*, 437 U.S. 535 (1978); *Berry v. Doles*, 438 U.S. 190 (1978); *Sanchez v. McDaniel*, 615 F.2d 1023 (C.A. 5th 1980). Indeed, the district court should not even pass upon the validity of the plan itself, but should leave that issue to the preclearance proceedings. *Sanchez v. McDaniel*, supra.

(12) The Judgment Below Should Be Reversed And The Case Remanded With Directions To Enter Judgment For Defendants

Here, unlike *Bolden*, this case was tried after the "intentional discrimination" principle had been held applicable in *Nevett II* (1978) and in a record where this requirement was frequently noted during trial (T. 8, 23; R. 547, 554, 673, 679, 585).

Defendants presented direct evidence showing that the system had not been retained for any discriminatory purpose. Plaintiffs' evidence was based solely upon the *Zimmer* factors, held insufficient in *City of Mobile*, supra. Where as here, the record on appeal is complete, this Court should reverse and remand for entry of judgment on behalf of defendants. *Boyle v. Wells*, 103 F.2d 237(C.A. 6th 1939), cert. den. 308 U.S. 579; *Engleman v. Cahn*, 425

F.2d 954 (C.A. 2nd 1969), cert. den. 397 U.S. 1009; *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170. Where plaintiffs' evidence is insufficient, reversal and remand for entry of judgment for the defendant is proper. *New York, etc., R. Co., v. Henagan*, 364 U.S. 441 (1960).

CONCLUSION

The judgment below should be reversed with directions to enter judgment on behalf of defendants.

Respectfully submitted,

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No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

I. WHETHER PURPOSEFUL DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT WAS PROVED IN THIS CASE

II. WHETHER STATUTORY ELECTION CASES MAY BE MAINTAINED WITHOUT PROVING INTENTIONAL DISCRIMINATION

III. WHETHER THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED ON THE BASIS OF THE FIFTEENTH AMENDMENT

IV. WHETHER THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED ON THE BASIS OF THE THIRTEENTH AMENDMENT

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CITATION OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	24
ARGUMENT	25
I. Purposeful Discrimination Under the Fourteenth Amendment Was Proved In This Case	25
A. The Evidence Of Intentional Discrimination In This Case Entirely Supports the Lower Courts' Conclusion That At-Large Elections Are Maintained In Burke County For The Purpose Of Discrimination	25
B. This Case Differs Significantly From The Facts And Issues Presented In *Bolden*	33
C. The Other Issues Raised By Appellants Have No Merit	36
II. Statutory Election Cases May Be Maintained Without Proving Intentional Discrimination	41
III. The Judgment Of The Lower Court Should Be Affirmed On The Basis Of The Fifteenth Amendment	46
IV. The Judgment Of The Lower Court Should Be Affirmed On The Basis Of The Thirteenth Amendment	48
CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Page
Allen v. State Bd. of Elections, 393 U.S. 544 (1969)	41
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	25
Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976)	33
Civil Rights Cases, 109 U.S. 3 (1883)	48
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	29
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)	36
Dougherty County Board of Education v. White, 439 U.S. 32 (1978)	42
FPC v. Florida Power and Light, 404 U.S. 453 (1972)	26
Fullilove v. Klutznick, 448 U.S. 448 (1980)	41
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	40
Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972)	38
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	43
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	49
Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981)	*passim*
McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981)	37

Memphis, City of v. Greene, 101 S.Ct. 1584 (1981) 48

Michalic v. Cleveland Tankers, 364 U.S. 325 (1960) 26

Mobile, City of v. Bolden, 446 U.S. 55 (1980) 27, 34

Moore v. Brown, 448 U.S. 1335 (1980) 35

Personnel Administrator v. Feeney, 442 U.S. 256 (1979) 26, 33

Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957) 26

Rome, City of v. United States, 446 U.S. 156 (1980) 41

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 3

Whitcomb v. Chavis, 403 U.S. 124 (1971) 33

White v. Regester, 412 U.S. 755 (1973) 35, 37, 38

Wilkes County v. United States, 439 U.S. 999 (1978) 46

United States v. Bd. of Comm'rs. of Sheffield, 435 U.S. 110 (1978) 44

United States v. Georgia, 436 U.S. 941 (1978) 32

Constitutional Provisions

Thirteenth Amendment to the Constitution of the United States 24, 40, 48, 49

Fourteenth Amendment to the Constitution of the United States 24, 40, 46, 48

Fifteenth Amendment to the Constitution of the United States 24, 40, 43-47

Georgia Constitution, Ga. Code §2-403 32

Statutes

42 U.S.C. §1971(a)(1) 43

42 U.S.C. §1973 41

Voting Rights Act of 1965, 42 U.S.C. §1973, et seq. ..... *passim*

Ga. Code §34-610(a) 8

Ga. Code §34-702 21

Ga. Laws of 1958, pp. 269, 279 3

Ga. Laws of 1931, p. 400 11

Ga. Laws of 1911, p. 390 11

Ga. Laws of 1873, p. 226 40

Miscellaneous

111 Cong. Rec. 8295 42

111 Cong. Rec. 8296, 10456, 10453-54, 11402-05, 11744-46 (1965) 44

U.S. Code, Cong. & Admin. News (1965) 43

40 Cong. Globe 668 (1869) 47

38 Cong. Globe 1319 (1864) 49

S. Rep. No. 162, 89th Cong., 1st Sess. (1965) 44

H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 44

H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) 45

Hearings on S. 1564 before the Com. on the Judiciary, United States Senate, 89th Cong., 1st Sess. (1965) 43, 44

Hearings on H.B. 640 before Subcom. No. 5 of the Com. on the Judiciary, House of Reps. 89th Cong., 1st Sess. (1965) 44

tenBroeck, *The Thirteenth Amendment to the United States Constitution*, 39 Cal. L. Rev. 171, 180 (1951) 49

Young, *The Negro in Georgia Politics, 1867-1877*, (Unpublished Thesis, Emory University Library) (1955) 40

STATEMENT OF THE CASE
PROCEEDINGS BELOW

This action was filed in 1976 challenging the use of at-large elections for electing county commissioners in Burke County, Georgia, on the ground that they had both the purpose and effect of discriminating against Black voters and candidates. The complaint was based on the Thirteenth, Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973. (R. 176, 180) Trial occurred in 1978 after discovery was completed.

After reviewing all of the evidence, the District Court concluded that "the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (J.S. 71a) The Court found that Blacks were "desperate to play a meaningful role in their local government," that the commissioners failed "to view problems with racial impartiality," that defendants had refused "to make Blacks a viable part of the county government," that the defendants' insensitivity "to the needs of the plaintiff class exists because of invidious racial motivations," that "in the past, as well as in the present, plaintiffs have been denied equal access to the political process," that "Blacks are shut out of the normal course of politics in this tightly-knit rural county," that Blacks have not had "meaningful political input," that the government has "retained a system which has minimized the ability of Burke County Blacks to participate in the political system," and that Blacks "unfairly have been denied a role in the political destiny of Burke County." (J.S. 78a-96a)

Having concluded that at-large elections were maintained for the purpose of discrimination, the District Court ordered elections to be held under a district election plan. (J.S. 96a-98a) That order was stayed by this Court pending appeal to the Court of Appeals for the Fifth Circuit.

On appeal, the Court of Appeals concluded that the District Court "correctly anticipated how the intent requirement in [past] cases would be applied to voting dilution cases . . . . It is clear . . . that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case." (J.S. 41a) After carefully reviewing the record and Judge Alaimo's opinion, the Fifth Circuit concluded that:

> [Judge Alaimo's] order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the County's Black residents to meaningfully participate therein. (J.S. 53a)

The Court of Appeals independently reviewed the evidence and agreed that purposeful, intentional discrimination had been proved.

> Judge Alaimo's evaluation of all of the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact virtually mandated by the overwhelming proof. (J.S. 53a-54a)

FACTS

Burke County Georgia, like many southern counties, has a history rooted in slavery, discrimination, and plantation life. But Burke County is significantly different than many counties in the South. The resistance to equal rights for Blacks has been worse there than in virtually all other Georgia counties (T. 120-21), changes have been slight over the past fifteen years (T. 746-47), and one finds there:

> The fact that politics was perceived [as] a white man's game, the assumption on the part [of] white citizens that black people should be excluded. (T. 551)

There has been no instance in the history of Burke County where the government has voluntarily allowed Blacks to progress politically or economically. Progress has occurred only when there has been federal compulsion, and it has occurred only over the fierce opposition of the entire White community of Burke County. The resistance to Black political rights has been especially pronounced. The voter registration and election processes have been controlled to this day to minimize Black voting and political activity. Before the Voting Rights Act was passed in 1965, Blacks were virtually eliminated from voting. (J.S. 71a-72a) The voting process then was "completely arbitrary." (T. 554) Blacks who went to register were met with the "nasty" attitude of the officials (T. 152), others were made to drive over and over many miles between their residence and the one registration location in the County (T. 70-73, 93-96), and they had to apply to register on one occasion and come back later for a test. (T. 805) If you could not pass the literacy test, which was designed to exclude Blacks from the ballot, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), you would be subjected to Georgia's infamous "Question and Answer" test. A significant number of Blacks tried that test. (T. 812-13) It was designed to ensure their failure, as is apparent from reading the questions. (Ga. Laws of 1958, pp. 269, 279) Not everyone had to take these tests or come back to register, of course. "Certain people were allowed to register." (T. 554) Even some Blacks were allowed to forego the "technicalities" of registration, bypass the literacy test completely, and be registered on their first trip, so long as they had a White man vouch for them. (T. 312-14, 328)

With the passage of the Voting Rights Act, the county commissioners first tried to eliminate all but one polling place (Pl. Ex. 11, T. 42) since the County's impoverished Black residents would then be unable to get to the polls to vote. (J.S. 86a) Voter registration was limited to one day, with a short Saturday morning time as well. (Pl. Ex. 7, 10, T. 39, 41) The Saturday registration period was later elimi-

nated (Pl. Ex. 197, T. 200) without approval under Section 5 of the Voting Rights Act. (Pl. Ex. 276, T. 662) Although Black registration increased, no polling place was ever added to accommodate Blacks. The one polling place change that has occurred since 1965, moved the location further from the Black community. (T. 687) Armed White police and sheriff's men patrol the polling places on election day, which Blacks see as a "threat because they have always been a symbol of injustice to most Blacks." (T. 689, 736-37) The county government rarely allows a Black to work as a poll official, and never in a position of responsibility. (R. 56, 414-22, T. 28-29) Whites tried to stop one Black leader from voting because his city taxes were allegedly not paid (T. 741, 758-59), although there is no legal authority for that in Georgia.

To this day, voter registration has been made as difficult in Burke County as possible. The effect has been predictable. Even with the salutary result of the Voting Rights Act, Blacks are still only 38% of the registered voters in the County (J.S. 72a), Whites are 62% of the registered voters, and Whites are registered at a "rate" 50% higher per capita based on voting age populations.[1] By comparison, defendants' expert witness, Dr. Ira Robinson, testified by deposition that Blacks have been registered at nearly the same rate as Whites "in most places in the South" since 1968. (Robinson Depo. 9, T2 257)

For years, the County allowed voter registration only at the courthouse, which is a "symbol of injustice" to Blacks.

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[1] The preliminary 1980 census report indicates that Blacks are 53.7% of the County's population, but many Blacks leave Burke County when they are adults because it is "an undesirable place for Blacks" (J.S. 83a n.18), so the voting age percentage is lower. That exact figure is not yet available in the 1980 census, but assuming the ratios of older Blacks to younger Blacks, and older Whites to younger Whites, is about the same as in the past censuses, Blacks are 47.6% of the total voting age population. (Pl. Ex. 59, T. 66)

(T. 676). It is where a black man could be lynched (T. 244), where no Black has ever worked, other than as maid or janitor (T. 298-99), where no Black ever held elected office, and where a Black citizen cannot even expect fair treatment from the local courts. (T. 750) The vestiges of segregation are literally everywhere in the courthouse. (J.S. 77a-78a; T. 747-48) Blacks do not feel welcome at the courthouse, for obvious reasons. The most educated and outspoken Blacks in Burke County still feel anxious when they have to go there. (T. 676) The District Court commented on one witness's testimony:

> [If] they keep the courthouse as a central place of registration, that fact alone will discourage blacks attempting to register because of the history of the courthouse as being a symbol [of] repression. (T. 557)

Rural Blacks are "most reluctant" to go to the courthouse to vote, they expect to be "antagonized" if they go there, and they are "in fear." (T. 152-53).

Aside from the psychological deterrent, the use of a single registration site in an area as large as Burke County (which is 832 square miles and about two-thirds the size of Rhode Island (J.S. 91a)), inevitably excludes Blacks from registration. Defendants' expert, Dr. Robinson, testified that he was "shocked" by the number of families that had no automobiles. (Robinson Depo. 39) Eighty-two percent of these families are Black. *Id.* at 12-13.

By comparison, the City of Waynesboro—which is the county seat—has three registration sites to conduct its separate voter registration. The sites are more convenient to Blacks. (T. 757-58) The City covers less than one percent of the area of the County. It added its two additional sites after a consent judgment finding unconstitutional its at-large elections. (Pl. Ex. 83A, T. 633)

Blacks asked for ten years for a registration site in each of the 15 voting districts. (T. 733-34, Pl. Exs. 197, 198) The County lied to them and said it was illegal to register voters anywhere but at the courthouse, and Blacks had to ask the Secretary of State to intervene. (T. 733-34) Two years before trial, three additional sites were finally approved, technically. Even this token response was more form than substance. The sites were opened only for a few days before the 1976 election. The chief registrar, Metts McNair, stated "that will give people four days to register. They can do it in that length of time if they really want to." (Pl. Ex. 99, T. 639)

In fact, even this nominal announced registration did not exist for Blacks. A White man by the name of Butler was named the deputy registrar in Gough, a predominantly black area of Burke County. When Blacks tried to register there, Woodrow Harvey testified that Butler told them:

> [He] didn't know anything about the folks that were supposed to register. He said he had not been given any cards and he had not been notified that he was going to register people at his store. (T. 319-20)

The next day, Mr. Harvey's wife also went to see Butler.

> And she went up to Mr. Butler's store, he replied to her that he didn't know anything about any cards and he had not been told anything about it. (T. 320)

When Mr. Harvey asked McNair about this, McNair gave him the run-around. (T. 321)[3] At trial, McNair testified that Butler "didn't understand the process" (T. 952), al-

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[3] Mr. Harvey testified:

Q. Did you speak to him about registration?

A. He said if we were going to support a certain candidate, we had to have a lot more people to support him if we expected to get people registered in the City of Gough, that we had to have more people

though all Butler had to do was sign the card once it was filled out. McNair also testified, contrary to Butler's representations to Blacks, that he did in fact take cards to Butler. McNair then testified that he took the cards back from Butler in order to give him some of a different color. McNair was unable to suggest any excuse for that switch since the cards were the same, regardless of color. (T. 952)[3]

In soliciting Butler to serve as a deputy (T. 954), McNair refused the enthusiastic offers of Blacks to serve as deputy (T. 724, 955-56), he overlooked a Black store owner in the area who is civically active (T. 953-54), and he continued the historic refusal of Burke County to ever appoint a single Black deputy registrar. (T. 677) The defendants' witnesses could offer no reason other than race, of course, for that fact. (T. 954-56) Blacks had even volunteered to serve as deputies without pay since the County first gave them the excuse that they had no money to pay for deputies, and since this had been done in other Georgia counties. (T. 724) By comparison, the County eagerly appropriates funds to hire additional employees in order to purge voters. (Pl. Ex. 257, T. 660, 818-20)

The District Court and Court of Appeals properly found that the right of Blacks to vote was directly denied in Burke County, and that this "overt conduct was taking

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get out and vote, that Mr. Butler didn't understand how to handle the cards.

Q. Did he say anything else about Mr. Butler's handling the cards?
A. He didn't think he was capable of handling them.
Q. My next question is, then why would he give him the cards, if he were incapable of handling them? Was there any response to that?
A. He didn't have any response. (T. 321)

[3] McNair testified:

Q. Did you know what the difference was, if any, between the white card and the blue card or any other color?
A. No, sir, I didn't. (T. 952)

place even at the time the present lawsuit was filed." (J.S. 44a, 81a)[4]

The state-wide laws of Georgia are also designed to minimize voter registration because they allow registration only at fixed sites, which precludes mobile or house-to-house voter registration. Ga. Code §34-610(a). Defendants' own witness admitted that there would be no practical problem in conducting house-to-house registration in Burke County (T. 815), and the evidence was undisputed that this restriction particularly hinders Blacks. (T. 677)

For local elections, Burke County has been a one party county since Reconstruction, and Democratic nominees invariably win. (J.S. 87a) Although the Democratic White primary was struck down by this Court 38 years ago, *Smith v. Allwright*, 321 U.S. 649 (1944), the Burke County Democratic Party remains the "party [of] elimination of black people in any office." (T. 566) Of the twenty-four members of the county governing body of the Democratic Party, only one was Black (J.S. 50a), and he was unable to ever attend a meeting because they were conducted during business hours when he worked. (T. 438, 532-33, 914)

The District Court found that the segregated Democratic Executive Committee plays an important role in local politics. (J.S. 87a) That should be obvious since the party's nominees invariably win local elections, the Committee members are the leading party members in the County, and

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[4] The slight expansion of voter registration, by the addition of three sites, occurred only after "friendly persuasion" by the District Court. (J.S. 44a-45a n.13) While the appellants now suggest otherwise (*Brief of Appellants* at 32), they never challenged this finding as clearly erroneous below. Their statement of the events ignores the fact that the registration sites were not actually made operative when they claim, they were only open for several days initially, Blacks were not even allowed to register at one of the sites, and the sites had not been permanently approved even by 1978. (Pl. Ex. 197, 198).

elected officials almost always come from that group. Every elected official who was asked at trial testified that he was a member or officer of the Burke County Democratic Committee. (T. 437-39, 474, 532, 880, T2 98-99, 137-38)

The Democratic Executive Committee has always operated as a self-perpetuating "club." Members are either appointed to vacancies by the other members (T. 437-39), often taking their fathers' position (T. 437, T2. 150), or they are solicited by the members to run for election, invariably without opposition. (T. 913) The Democratic Committee is virtually unknown in the Black community. (T. 692) Until recently, the Democratic Party conducted the primary elections in the County. (T2 99) The Party still handles the qualifying process for individuals who want to run for its executive committee posts, and for individuals who want to run in the primary to seek nomination for public office. (T. 884, 894-95) The procedure for qualifying to run in the democratic primary is a virtual secret. As the party chairman testified, he "can tell them how it is done" if anyone asks how to qualify. (T. 889-90) They would "have to see the secretary of the Democratic executive committee." (T. 884) Blacks would have no idea who to ask, however, since they are excluded from the Democratic Party, and few have even heard of the Executive Committee. (T. 692) The Committee has published short legal advertisements that announce elections, but they are hardly designed to give any real public notice of the elections or qualifying process. They are little formal ads contained among foreclosure notices and the like, and, as expected, Blacks have not seen the ads. (T. 737, 894, D. Ex. 16, 17, T2 262) The Committee has ignored state and national party rules on fair representation, and it received no input from Blacks when it set up districts for electing its members in 1976, as required by State rules. (J.S. 87a-88a, T. 890-93) The districts adopted by the Committee all had White voting majorities. (T. 534-42, 891-92)

There are other reasons why Blacks are not registered in Burke County, each rooted in past and present discrimination and racial oppression. Blacks still have a tremendous amount of fear, both of physical harm and of economic retaliation, that might be experienced were one to enter the "white man's game" of politics. In the few years before this case was filed, Black people were shot at in Burke County for seeking equal rights (T. 113, 125-26, 134, 682-83), they received bomb threats and harassing phone calls, and they were the subject of physical harassment. (T. 206-07, 671-73, 684) Appellee Herman Lodge, received "some very nasty" phone calls simply because this case was filed. (T. 672-73) Blacks must operate virtually "in secret" to avoid the possibility of reprisal for political activity. The Burke County Improvement Association cannot maintain membership records for fear of reprisals if they were discovered. (T. 670, 709)[8] Some Blacks still fear their ballot is not secret because of past practices of White voting officials. (T. 689-91)

Blacks in Burke County suffer a precarious economic existence that is "in part caused by past discrimination." (J.S. 83a) Their poverty, the fact that Whites control nearly all the money and jobs in the County, and the history of severe oppression leaves many Blacks afraid to simply register to vote. They fear repercussions they cannot afford.[9] Fear has

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[8] One witness testified:

> Well, we did not keep membership records because of the fact that a lot of people in there would be vulnerable, I guess, to reprisal, and they were afraid to, you know, to help but, afraid because of certain positions, that is, the teachers were real vulnerable and in a real vulnerable position during this period. (T. 670)

[9] One witness testified:

> There was fear in regard to registration . . . . [T]he black population, of course, of Burke County was a population which had [a] great degree of dependency which is a political thing throughout the plantation society, growing out of the low income, the under-employment and such phenomenon as that, as well as their vulnerability to white

always been pervasive in Burke County, and it remains so to this day. (T. 115, 120, 126, 134, 136-37, 152-53, 177-78, 551-53, 555, 670-77) Their poverty has formally excluded them from office since there has been a "freeholder" requirement to serve as county commissioner since 1911. (Ga. Laws 1911, p. 390; Ga. Laws 1931, p. 400; J.S. 65a n.2, 75a)

Both plaintiffs' and defendants' witnesses suggested that the depressed Black educational levels also contributed to their under registration, and lack of access to the political process. (T. 675-77, 912) That is obviously a product of discrimination, as the defendants concede. (T. 912)

The at-large election device itself directly minimizes Black political activity. Since blacks cannot win in a county-wide election, there is no reason to run, and they are further alienated from the political process. There is little reason to vote since the choice among the white candidates is just a matter of choosing the "lesser of two evils." (T. 694)

The county commission controls public affairs in Burke County by appointing individuals to many boards, authorities, committees and other offices, including the elections board. Blacks are rarely appointed (R. 57, 88-94, T. 30, J.S. 78a), and when they are, federal funds and Title VI of the

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employers and what have you. And the apparent acceptance by whites of the behavior towards blacks of intimidation by whites towards blacks . . . .

. . . .

They would have this feeling of intimidation because of their vulnerability in terms of jobs as time went on and because of welfare dependency. (T. 552)

Another witness testified:

Now, there is fear of economic reprisal from you know, like people say, well, I'm not going to vote because if I go to register, my welfare check might be cut off. (T. 675)

1964 Civil Rights Act are the cause. (E.g., Pl. Ex. 28) Defendants admit that there are no particular qualifications for these positions, that Blacks are as equally qualified to serve on these boards as Whites, and that there is no objective reason why Blacks had not been appointed. (T. 399-402, 445, 478) The commissioners solicit Whites for the posts (T. 399-400), but overlook Blacks even when they seek appointment. (T. 184) As one commissioner testified, Blacks are not appointed because: "That's just the way things are." (T. 296)

The exclusion of Blacks from these boards reflects the firm refusal of the county commissioners to accord Blacks any role in the political process. The boards are important elements of government, they control many public operations, and they make policy recommendations to the county commissioners. (T. 401) The exclusion of Blacks from these posts eliminates them from having input into the operation of much of government. (T. 401-02) Their exclusion also undercuts the opportunity for Blacks to participate in politics. They are denied the public experience and exposure that is an integral part of politics, and they are deterred from political activity. One witness testified:

> If it is not by appointment of black people to government agencies, you remove from the activism of a community just a special kind of reward. On that, I think it has an effect upon the motivation to continue. (T. 565a)

The commissioners' refusal to appoint Blacks tells the entire community, both Black and White, that white supremacy remains the policy of Burke County. It is "a general signal to the overall community about how their affairs are to be conducted. . . ." *Id.* As the District Court concluded:

> [The] Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a mean-

> ingful fashion, is without doubt an unfair denial of access of input into the political process. (J.S. 89a)

This evidence is very telling. Since the commissioners do not feel Blacks are suited to hold these appointed positions, they would hardly believe that Blacks should serve on the commission itself.

Much other evidence is also telling about the attitudes and motivations of the county commissioners. The entire theory of the defense in this case, in fact, sounded like the traditional justifications for White supremacy. The defendants and other public officials testified that it was not the at-large election system or other government action that excluded Blacks from the political process, but the fact that Blacks "do not take an interest in [politics]" (T2 166), that they "just have an interest in other things" (T2 169), that they "wouldn't think that [Blacks] would be interested in politics" (T. 799), and that Blacks do not register because of "indifference, don't care about politics probably." (T. 807) As the long-time state legislator from Burke County stated:

> They don't seem to care about [the] political process, I think they work hard and they worship and they're very interested in their relations and affairs, but they do not take an interest in the political process. (T2 166)

To casually dismiss the historic elimination of Blacks from the political process because they are "indifferent," is strikingly similar to the historic justification for White supremacy—that Blacks are not political beings, and that one would not expect them to be holding office or an appointed position with a board. Since Burke's Whites believe that Blacks are not political beings, it is easy to rationalize the exclusion of Blacks from the elective process.

The county commissioners, who are the most powerful figures in the County politically (T. 215-16), demonstrated

their lack of concern for, and outright hostility towards, Blacks' civil and political rights in other ways. For example, while the County employs Blacks only in menial positions (J.S. 75a, 85a, 94a)—and while those Blacks who are employed are usually hired only where there is federal money and the compulsion of Title VI of the Civil Rights Act (J.S. 76a)—the county commissioners see no problem with this situation. Commissioner Buxton testified that it was "obviously" the custom to rarely employ a Black person in county government, and "that that has been the situation during the last eight years during the time that [he has] been County Commissioner." (T. 299) Commissioner Marchman testified that the County doesn't "have any hiring policy" (T. 240), that they have never issued any "policy suggesting that Blacks be hired equally" because they "never have realized a problem in that area," and he didn't "see any problem . . . in terms of black employment . . . with the County Government." (T. 241)

Commissioner Marchman publicly stated that he "could care less" about having a swimming pool built at the public park that is used by Blacks, although the White pool in the County, which is now owned by the Jaycees, was given to them by local government to avoid desegregation. (T. 232-33) Two commissioners indicated their present belief in segregation. (T. 257-59, 264-66, 279) Another testified that desegregation might conceivably be accepted in Burke County in another thirty years (T. 378), and another testified that Blacks were referred to as "niggers" in county commission meetings. (T. 242-44) Apparently acknowledging the absolute separation of the races in Burke County, one commissioner testified that "I can't speak for them [Blacks]." (T. 388) Another testified: "I'm speaking as a white person, but I don't know what a black person thinks." (T. 309) This same man, when asked if this hindered his ability to represent Blacks, testified: "I don't get you." (T. 308-09)

The chairman of the county commission believes that Black people inherently trust Whites more than they do Blacks (T. 389-90), a notion that is part of traditional White supremacist thinking. In the county courthouse, which is under the control of the commissioners, the "nigger hook" still hangs in place (J.S. 77a), the "colored" and "white" signs have never been eradicated from the courthouse restroom doors (J.S. 78a), the seating in the courtroom remains segregated (T. 747-48), and the judicial process there hands out justice unequally. Crimes against Blacks are barely punished, while crimes against Whites are punished most severely. (T. 750) Notwithstanding the exceptionally high degree of segregation and discrimination that remains in Burke County, the commissioners believe that nothing should be done about it. (T. 256-57) The commissioners believe that nothing need be done about racial discrimination because "the Federal Government took care of that." (T. 299-300)

The commissioners' adherence to segregation and support of a status quo which refuses to accord Blacks full civil and political rights, is naturally a reflection of the White community that elected them. In Burke County, the Whites have always been "in tremendous horror of blacks coming into power there" (T. 115), the changes from the old patterns and attitudes of segregation have been slight over the past fifteen to twenty years (T. 213, 562), and Whites have vehemently opposed every effort by Blacks to move forward. The battle over equal education is typical. Before this Court's 1954 desegregation decision, Black education was dramatically inferior. The per student value of books and teaching aids in the Black schools was one-tenth that in the White schools, the per student plant maintenance and operating budget for the White schools was thirty times that in the Black schools, the per pupil investment in White schools was ten times that in the Black schools (Pl. Ex. 278, pp. 2, 3, 14, 15, 16, & 17, T. 662), and Blacks attended one-room schoolhouses that contained grades one through seven

in a single room. The facilities were "vastly different" for Whites and Blacks. (T. 666) Until the early 1960's, the County closed the Black schools down until mid-October to ensure that Blacks would be available to pick cotton for the White farmers. (T. 667)

In the 1960's the Burke County delegation to the State commission on school desegregation "presented the most overwhelming vote [of all the delegations] in favor of . . . closing public schools" to avoid desegregation (Pl. Ex. 126, T. 643). The county officials were unanimous that Burke County "would never integrate" *id.*, the county commissioners resolved that there should be a private school to avoid desegregation (Pl. Ex. 31, T. 48), and they called upon the government to pay tuition "to the parents who send their children to Burke Academy, Inc." (Pl. Ex. 32, T. 49). The County received national attention for its vehement response to *Brown*. (Pl. Ex. 128, T. 643) When a school desegregation suit was filed in 1968, the chairman of the board of education announced that the schools would remain segregated at least until some order "by the Court," and the county commissioners announced that they were "legally and morally obligated" to pay attorneys' fees in defending the segregated system. (Pl. Ex. 89, T. 635)

Because of the extreme racial hostility in Burke County, freedom of choice was a complete failure there. Not a single White went to a Black school, and very few Blacks had the courage to cross over. (Pl. Ex. 147, 226-28, T. 647) Of those that did, one was nearly assassinated when she lay sleeping in her bed at home. (T. 133, 124-26, 134, 682-83) Only one White person in the entire County supported desegregation, and he was shunned and harassed because of it. (T. 206-07) The school board tried to avoid full desegregation by making all Black schools vocational schools, all White schools college prepatory, and tracking the students based on preschool-age tests. (Pl. Ex. 156-57, T. 648)

The private Edmund Burke Academy was begun to avoid desegregation. The local bar association volunteered its services to the Academy as a "pro bono" project. (Pl. Ex. 129, T. 644) Its list of incorporators included most of the public officials in the County, including some of the appellants in this case. (Pl. Ex. 131, T. 644, 470-75) The Academy began operations with a building given it by the County Board of Education (Pl. Ex. 132, 215, T. 645, 56), which still allows the Academy to use its facilities so long as the federal government does not interfere. (Pl. Ex. 173, T. 650) The State provides books (T. 429-30), the county commissioners personally serve on the Board of Directors and send their children there, and appellant Rogers has given the school six acres of land for a nominal sum. (T. 266, 375-76, 470-77, 486-87, Pl. Ex. 211, T. 655) As the local newspaper editorialized about the Burke Academy:

> [We] are no longer cursing the Supreme Court, we are now standing to one side and watching them butt their heads against a stone wall. (Pl. Ex. 128, T. 643)

The educational picture has not improved today. Most Whites who can afford the tuition still attend Burke Academy (T2 88, Pl. Ex. 95, T. 637), the school superintendent still rails about the "assinine" desegregation decisions of this Court (Pl. Ex. 237, T. 658), many activities are no longer carried on in the public schools since integration (T. 698-99), and private facilities such as the local White country club are no longer available for the students to use. (T. 697-98) As the District Court found:

> [The] unbroken history of an inferior formal education has had and does now have a strong tendency to preclude Blacks' effective participation in the political process. (J.S. 84a-85a)

The fierce resistance to school integration typifies race relations in Burke County. Unlike most counties in the South, no biracial committee was formed to deal with racial

problems (T. 420), Blacks and Whites had never even met before 1967 to talk about racial problems, (T. 117), and there was much noncompliance with federal desegregation laws. In the 1970's, only one doctor in Burke County had desegregated waiting rooms, the county hospital was still segregated, the County Health Department treated Blacks so badly that some turned down its free services (T. 194-200, 216-17, Pl. Ex. 223), and White doctors refused to certify Black patients as disabled when they sought disability benefits. (T. 123-24) When the 1964 Civil Rights Act was passed, the owner of the one downtown lunch counter closed his business rather than integrate (T. 684), the movie theater remained segregated a decade after the 1964 Civil Rights Act, and when Blacks finally did try to leave the balcony and sit downstairs, state troopers had to intervene. (T. 685-86, 732-33) There are two laundromats in Burke County, today, one Black and the other White. The White one is situated prominently one half block from the County Courthouse (T. 321-22), and Blacks are allowed there today only if they go to wash a White person's clothes. (T. 321-22, 332-33, 740)[7] "Whites only" signs are displayed openly on houses for rent (T. 334), deeds are sometimes still filed reflecting whether the property is Black or White (Pl. Ex. 212, 655), and poor Whites will not even avail themselves of

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[7] Just a few days before trial, a black woman entered the white laundromat. She testified that:

> [The man in charge] stretched his arms out then and said, don't you see that sign on the door? I said, yes, I see that it says private. So, what does that mean? He says, that means if you're colored, you can't use the wash house. There's one on Eighth Street, one on the other side of the railroad tracks, why don't you go over there and use that one. And I said I prefer to use this one. So then he said, *the way you colored people acted a long time ago, we were able to deal with you, but now you're pulling all kinds of things and stuff.* So, I said, if I wash my clothes here what will happen and he said, if you just hang around here until the boss man gets back, you will see what will happen to you. (T. 333) (emphasis added)

government assistance if it means associating with Blacks. (T. 141-42, 340)

Segregation in Burke County remains remarkably entrenched. All private organizations are segregated (T. 276-77, 233-37, 279-83, 296-97, 309-11), there is no cross-race social mixing (T. 238-39), and Blacks do not travel in White areas even though Burke County is rural and Black and White neighborhoods are close. (T. 323).

Segregation has a tremendous impact on politics in Burke County. It nurtures the pattern of racial bloc voting which ensures that Blacks cannot win at-large elections. (J.S. 46a) Blacks are entirely foreclosed from participating in the political and social processes which determine who the political leaders will be, Whites personally know prospective White candidates, and "[w]hen this factor is combined with the virtual segregation of all social, religious, and business organizations . . . , the result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county." (J.S. 88a-89a) As the Court of Appeals concluded: "Person-to-person relations, necessary to effective campaigning in a rural county, [are] virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks." (J.S. 49a-50a) Burke County is a "continuation of the old southern pattern of keeping Blacks out of politics." (T. 587)

The District Court found that Blacks are completely excluded from the political process. The Court commented:

> It is the Court's impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The Commissioners have been singularly unresponsive to this need. (J.S. 78a)

Blacks have been "forced to attack [the system] from without" by court orders and economic boycotts.[8] Blacks were excluded from the grand juries and trial juries in Burke County until a federal court order was entered in 1977. (J.S. 75a, Pl. Ex. 82A, T. 632-33) Blacks were unconstitutionally excluded from elections in the City of Waynesboro until the at-large election system was eliminated by court order in 1977. (Pl. Ex. 83A, T. 633). Excluded from meaningful political input by at-large elections, their sole voice has been to organize economic boycotts. (T. 668-69).

It is clear that county-wide elections exclude Blacks from political office. No evidence suggested that a Black could get elected. The local state legislator, who is also the Secretary of the Democratic Committee (T2 137-39), admitted that a Black could not be elected county-wide. He testified:

> Q. . . . [Y]ou knew full well that Burke County would never elect a black? You knew that, didn't you?
> A. Yes. . . . (T2 168)

There was no substantial evidence that at-large elections served any other function in Burke County. One of the defendants' witnesses was asked to compare district and at-large voting in Burke County. The "only reason" he could think of to distinguish the two was race and a desire to prefer one race over the other.[9] (T2 101-02) If the purpose of a district system would be to give "an unfair advantage" to

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[8] "Blacks have been forced outside the local government for relief. They went to the courts to seek school and Grand Jury integration . . . , and to the streets to 'agitate,' as defendants have said, to get lighting at the Davis Park Ballfield. Outside pressure had to come to bear before the county budged." (J.S. 81a)

[9] Q. Do you have any preference yourself as between the present system of countywide elections and the elections by the voters only in a district of the county?
A. I would prefer it being like it is.
Q. Why is that?

Blacks — by allowing them some participation in the political process — maintaining at-large elections must certainly have the purpose of denying Blacks that "advantage."

To determine whether there were any practical drawbacks to a district system in Burke County, two of the county commissioners were asked what problems they would face if they were drawing up a district election plan. They saw none. They just testified that the districts would have to have equal populations. (T. 422-24, 462) Commissioner Robert Webster testified that at-large elections served no purpose in comparison to district elections.[10] Some of the defendants' witnesses attempted to offer one justification or another for county-wide elections. They were not convincing. Judson Thompson, a past commissioner and Chairman of the Democratic Party, testified that it was impossible to draw districts with equal populations in Burke County. (T. 883) Mr. Thompson's testimony was an apparent effort to fabricate a pretext for at-large elections. It is easy to draw election plans with equal population districts, and neither plaintiffs nor defendants had any difficulty in submitting district plans to the Court. (E.g., Pl. Exs. 300, 301)

Another witness suggested that there might be a problem in drawing districts because they could cut across the militia lines in the County. But the same witness admitted that there were no problems where state legislative districts cut across the militia district lines (T2 114), district election plans could be drawn that would hardly deviate from the militia districts (Pl. Ex. 301), Georgia law allows for elec-

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A. Well, the only reason I can think of doing a district would be to fix the districts at such gerrymandering which would bring about an unfair advantage to one race. (T2 101-02)

[10] Q. It is your testimony, isn't it, that in the event the county was divided into districts, it would not make any difference at all?
A. I think I've said that, yes. (T. 484)

tion districts to be modified so that they do not have to correspond to militia district lines, Ga. Code §34-702, and there were any number of other ways of accommodating a change to districts.

Appellants offered testimony that county-wide voting might avoid "political deals and trades" in Burke County, but these witnesses were not familiar with any of the district systems in operation in Georgia, and their testimony was admittedly speculation. (T. 390-91, 451, 909-11) Moreover, since Blacks would become part of the political process under a district system, since they would enjoy full political rights and public office then, and since they would be able to deal from an equal basis with Whites, there would in fact be a new breed of "political deals and trades" in Burke County. Since Whites "generally . . . have the same interests" in Burke County (T2 141), the political dealing the defendants fear must be solely what would occur between Whites and Blacks. To justify at-large elections because they preclude "political dealing" in Burke County, is virtually to admit that their purpose is to exclude Blacks from the political process, to maintain the status quo of political domination by Whites, and to eliminate any Black voice in county government.

The District Court concluded that at-large elections were maintained in Burke County for invidious purposes. Judge Alaimo found that voter confusion would not be a problem with district elections, and he concluded that it was so simple to institute district elections that it could be done in a few weeks time. (J.S. 98a) The Court noted that the Burke County Democratic Party elected its governing board from districts, that this district scheme created no problem whatsoever, and that other local governments elected by districts in Georgia appeared to function perfectly well. (J.S. 91a) The Court concluded that "defendants are heedless of the needs of the Black community" (J.S. 95a), that Burke County's representatives "have retained a system which has

minimized the ability of Burke County Blacks to participate in the political system" (J.S. 90a), that the "Commissioners have been singularly unresponsive to this need" of Blacks to participate meaningfully in local government (J.S. 78a), that the insensitivity of defendants to the needs of the plaintiff class "exists because of invidious racial motivations" (J.S. 82a), and that the at-large election process in Burke County "has been subverted to invidious purposes." (J.S. 90a) The Court of Appeals affirmed in all regards, stating that:

> Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact, virtually mandated by the overwhelming proof. (J.S. 53a-54a)

The events which transpired after the trial court's judgment dramatically confirm Judge Alaimo's conclusion. A special election was ordered for November, 1978, and it included five districts with two that had a majority of Black registered voters. One Black qualified to run in each of the five districts, one White qualified in three of the districts, and two Whites qualified in the other two. (J.S. 63a, 97a, Stipulation Filed October 27, 1981) Although this Court stayed that order before the election occurred, one of the white candidates dropped out, before the stay, from each of the two districts where there was another white candidate running. (Stipulation, *supra*) This is the only instance in the history of Burke County where one can see what happens under district elections, as compared to at-large elections. Under districts, Blacks are involved in the political process and run for office. Under an at-large system, none are even on the ballot. Even more telling is the manipulation by the White candidates to minimize the possibility of a Black being elected. The obvious explanation for the two Whites dropping out of the election, is that they did not want to split the White vote between themselves and the

other White candidates, which would have given the Black candidates a good chance of election. Whites in Burke County would rather forego public office themselves, than make it possible for Blacks to get elected.

SUMMARY OF ARGUMENT

The District Court and the Court of Appeals concluded that at-large elections were maintained in Burke County for the purpose of discriminating against Blacks. That conclusion was based on a tremendous amount of evidence from which the lower courts inferred a discriminatory purpose. The evidence was mostly circumstantial, and circumstantial evidence is sufficient to prove motive in a Fourteenth Amendment case, just as in all other areas of law where motive is relevant. The evidence here is more than sufficient to support the judgment below, and the findings are surely not clearly erroneous.

Appellees also rely on Section 2 of the Voting Rights Act of 1965 as an alternative basis for affirmance. Section 2 applies in cases where districting schemes are challenged, and it is not necessary to prove intentional discrimination in a Section 2 case. It is sufficient, at the very least, to prove that the challenged system perpetuates the effects of past discrimination.

Appellees also rely on the Thirteenth and Fifteenth Amendments. Neither requires proof of a specific intent to discriminate. The Thirteenth Amendment is broader than the Fourteenth Amendment in a number of ways, most importantly because it reaches purely private conduct. The Fifteenth Amendment necessarily provides a stronger cause of action for a plaintiff in a vote dilution case, than does the Fourteenth Amendment, because the Fifteenth Amendment applies specifically and exclusively to voting. Any other interpretation of the Fifteenth Amendment would render it meaningless.

ARGUMENT

I. Purposeful Discrimination Under the Fourteenth Amendment Was Proved In This Case

A. The Evidence of Intentional Discrimination In This Case Entirely Supports The Lower Courts' Conclusion That At-Large Elections Are Maintained In Burke County For The Purpose of Discrimination.

The issue in this case is straight-forward. It is whether indirect evidence will support a court's conclusion that an election procedure is maintained for discriminatory reasons, or whether direct proof of discriminatory intent is required. The Court of Appeals held that indirect proof was sufficient.[11]

> [I]t is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination . . . . Circumstantial evidence, of necessity, must suffice, so long as the inference of discriminatory intent is clear. (J.S. 8a)

This Court has expressly held that circumstantial evidence may be used in the overall inquiry. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429

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[11] The Court of Appeals reasoned:

> We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate." Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply, there will be no "smoking gun." (J.S. 8a n.8)

U.S. 252, 266 (1977). As Justice Powell wrote in *Arlington Heights*, it would be an "extraordinary" case where a legislator would take the stand to testify about his intentions. Circumstantial evidence is therefore necessary, and courts should focus largely on extrinsic factors, as this Court indicated in *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 n.24 (1979).[12] In all other areas of the law, evidence of the sort offered here would be far more than necessary to support the judgment. The rule on sufficiency of the evidence should be no different in this case. *Compare FPC v. Florida Power & Light*, 404 U.S. 453, 468-69 (1972); *Michalic v. Cleveland Tankers*, 364 U.S. 325, 330 (1960); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957).

The District Court here complied fully with this Court's purposeful discrimination decisions. After reviewing all of the evidence, the Court concluded that "the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (J.S. 71a) The Court found that Blacks were "desperate to play a meaningful role in their local government," that the commissioners failed "to view problems with racial impartiality," that Blacks are given the "run around" once they make their needs known, that defendants had refused "to make Blacks a viable part of the county government," that the defendants' insensitivity "to the needs of the plaintiff class exists because of invidious racial motivations," that "in the past, as well as in the present, plaintiffs have been denied equal access to the political process," that "Blacks are shut out of the normal course of politics in this tightly-knit rural county," that several factors, "all of which seem to be related to past discrimination, operate unfairly to ex-

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[12] "Proof of discriminatory intent must necessarily usually rely on objective factors . . . . The inquiry is practical. What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid." 442 U.S. at 279 n.24.

clude Blacks from the normal course of personal contact politics in Burke County," that Blacks have not had "meaningful political input," that the government has "retained a system which has minimized the ability of Burke County Blacks to participate in the political system," and that Blacks "unfairly have been denied a role in the political destiny of Burke County." (J.S. 78a-96a)[13]

Although the District Court did not have the benefit of this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court followed the earlier intent decisions. As the Court of Appeals stated:

> A court that correctly anticipated how the intent requirement in past cases would be applied to voting dilution cases, as in *Bolden*, could correctly interpret and apply the law, without the benefit of [*Bolden*]. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case. . . . It is clear . . . that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case. (J.S. 41a)

Judge Alaimo discussed and considered *Zimmer* kinds of evidence, as he is authorized to do under *Mobile*, but he made findings of intentional discrimination that were based on the entire record. After carefully reviewing the record and Judge Alaimo's opinion, the Fifth Circuit concluded that:

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[13] Commenting on the county commissioners' refusal to allow Blacks any meaningful participation in the political process, the refusal to acknowledge other legitimate interests and needs of Black citizens, and the commissioners' dedication to preserving an all-White political structure with the at-large election system, the Court found: "The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. Such indifference attests to the Commissioners' realization of the Blacks' political impotence, both individually and collectively." (J.S. 95a)

[Judge Alaimo's] order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the County's Black residents to meaningfully participate therein. (J.S. 53a)

The Court of Appeals independently reviewed the evidence and agreed that purposeful, intentional discrimination had been proved. The Court characterized the evidence of intentional discrimination as "overwhelming." (J.S. 54a)

The Fifth Circuit followed Justice Stewart's opinion and rejected the *Zimmer* test as a categorical way of determining the constitutionality of at-large elections. In rejecting *Zimmer*, Justice Stewart wrote that the trial court must focus on the ultimate factual issue—what is the *purpose* that motivates the adoption or retention of the scheme? The Court of Appeals plainly recognized this requirement and the limits of *Zimmer* evidence.[14] (J.S. 35a)

At the same time, the Court of Appeals held that the *Zimmer* criteria might have some evidentiary relevance in determining purpose, as the *Mobile* plurality recognized, but that other criteria and evidence must be considered as well. The Court held that the *Zimmer* criteria may provide some evidence of intent, but they were "not dispositive on the question of intent." (J.S. 39a) That is precisely Justice Stewart's view in *Mobile*. 446 U.S. at 73. The Court of Ap-

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[14] The Court of Appeals held that:

> Though four Justices were satisfied with the *Zimmer* criteria [in *Bolden*], five Justices clearly rejected the exclusive use of those criteria for inferring purpose or intent. We conclude that they rejected the use of *Zimmer* criteria to the extent that [the Fifth Circuit], in *Bolden, presumed* the existence of a discriminatory purpose for the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. (J.S. 35a)

peals also followed the plurality opinion and held that the *Zimmer* factors were relevant only insofar as they might elucidate the basic question of purpose (J.S. 35a), and that purpose must be decided "only in light of the totality of the circumstances." (J.S. 40a)

In assessing the District Court's opinion under the intent test, the Court of Appeals concluded:

> [A] careful reading of Judge Alaimo's order leads us inescapably to the conclusion that he made the type of independent inquiry into intent that we have said is necessary. (J.S. 53a)

Thus, while the appellants' Brief reads as if the Court of Appeals willfully disregarded *Mobile*, appellants ignore the conscientious effort of the Court to implement the *Mobile* ruling. The appellants' only real complaint here is with the facts that have been found against them, but as the Court of Appeals concluded after reviewing the record:

> Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. *His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact, virtually mandated by the overwhelming proof.* (J.S. 53a-54a) (Emphasis added).

As Chief Justice Burger has written, the Justices of this Court should defer to the trial court when intentional discrimination has been found, even if they might "have serious doubts as to how many of the [defendants' actions] can properly be characterized as segregative in intent and effect." *Columbus Board of Education v. Penick*, 443 U.S. 449, 468 (1979). That rule is even more appropriate here than in a school desegregation case, because the "extremely unique factual context for decision [puts the trial court] in a far better position to evaluate the local political, social, and economic realities." (J.S. 40a) Such deference is especially warranted in this case since the trial judge had served

as a county commissioner in another county, and he was uniquely qualified to determine the intent issue here.

The appellants' factual contentions should not be heard here for another reason. They did not challenge any of the findings as clearly erroneous in their appeal to the Fifth Circuit, and they cannot be raised now. Moreover, any challenge on the basis of the clearly erroneous test would be frivolous. The circumstantial evidence of intent was not merely substantial, it was overwhelming. (J.S. 54a)

The impact of the at-large system in Burke County is "an important starting point" in determining purpose. The impact here is "stark," so that evidence is particularly relevant. 429 U.S. at 266. Defendants admit that Blacks cannot be elected county-wide (T2 168), and Blacks are deterred from even running for office because of the impossibility of winning. There has been an unbroken history of opposition to political rights for Blacks. Virtually all Blacks were kept from the ballot until the federal government enacted the Voting Rights Act in 1965. The county commissioners then tried to eliminate all of the polling places in the County but one, voter registration was made inaccessible, county officials lied to Blacks who sought additional registration sites, courthouse registration alone was allowed until the federal court pressured the County into adding additional sites, and Blacks were getting the run around in the voter registration process as recently as 1976. Blacks are not allowed to serve as deputy registrars, and Blacks are not chosen to work at polling places. Blacks are excluded from the Democratic Party whose nominees invariably win local elections, the local Democratic Party has ignored rules on fair representation, and the process for qualifying to run in the democratic primary is virtually secret.

Blacks are "shut out of the normal course of politics" because of the "deep-rooted discrimination by Whites against Blacks." (J.S. 49a-50a, 88a-89a) Blacks fear reprisals should

they enter into the "white man's game" of politics, the major Black civic organization in the county cannot even have a written membership list because of fear of reprisals, and these cumulative fears are, unfortunately, the rational product of the very recent history of oppression, discrimination and outright violence directed at Blacks.

Blacks are discriminated against in all phases of local government. The county government rarely allows them to serve on any of the public boards and authorities that operate the government, Blacks were excluded from juries until a federal court order entered in 1977, and they were unconstitutionally denied access to the electoral process in Waynesboro, the county seat, until a court order entered in 1977. It is assumed in Burke County that Blacks should not have a role in politics, Whites rationalize the exclusion of Blacks on the basis that Blacks "are just not interested" in politics, and Whites have resisted desegregation in Burke County as long, hard and successfully as anywhere in the nation.

In determining purpose, the trial court considered a host of other discriminatory laws passed by Georgia (J.S. 76a, R. 334-38), many of which are still on the books. The pattern behind at-large elections is a telling factor in this case because 18 counties in Georgia switched from district elections to at-large elections after enactment of the Voting Rights Act when Blacks began to vote. (R. 398-99) Conversely, with the advent of the Black vote, no county voluntarily switched to a district system. That pattern is certainly some evidence of discrimination in the use of at-large elections. Similarly, Georgia recently adopted the numbered-post and majority-vote requirements, which give the majority White electorate in Burke County and nearly every other Georgia county complete control of all commission seats. Those laws were conspicuously adopted precisely

when Blacks began to vote in the 1960's. (J.S. 65a n.2)[18] The new 1976 Georgia Constitution readopted literacy and understanding tests, Ga. Code §2-403, which are inoperative solely because of the Voting Rights Act.

Much evidence was introduced concerning the racial attitudes of the White community and White public officials. It showed a firm commitment to segregation, a belief that Blacks were not political beings, and unyielding opposition to equal rights for Blacks.

While this is only a part of the evidence that was introduced, it certainly supports the trial court's finding that at-large elections in Burke County are one more in a series of many, many efforts to limit the civil and political rights of Blacks. There was virtually no countervailing evidence presented. The evidence of other purposes was unconvincing, an apparent effort to fabricate a pretext. Moreover, as this Court held in *Arlington Heights*, plaintiffs need not show that the sole motivation was discriminatory, but just that it be "a motivating factor." 429 U.S. at 265-66. The finding of discriminatory purpose here is not clearly erroneous.

It is clear in this case that Blacks attain a measure of fair treatment and equality in Burke County only when the federal government intervenes. That is no less true with the electoral process than in any other phase of Burke County life. Unless the federal courts intervene, Blacks will never be allowed to participate fully in the political process. So

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[18] The change to majority vote and numbered post were approved under Section 5 of the Voting Rights Act by the Attorney General. However, the United States later filed an action against the State of Georgia contending that Section 5 approval had been obtained fraudulently because the State had included them in a general recodification of the election code, and the United States had never been made aware of these changes when it passed on the general recodification legislation. *United States v. Georgia*, 436 U.S. 941 (1978).

long as the White politicians of Burke County are allowed to determine the rules of the "white man's game," those rules will be maintained to ensure that Blacks are excluded.

This Court has held that there is no constitutional violation where a minority group loses elections because of the normal "give and take" of the political process. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). As this Court said in *Feeney*: "It is presumed that 'even improvident decisions will eventually be rectified by the democratic process.' " 442 U.S. at 272. But where Blacks are completely excluded from the political process, and where they are subjected to ongoing intentional discrimination in all aspects of public and private life, then there is no "give and take," improvident decisions cannot be rectified by the democratic process, and judicial intervention is both necessary and appropriate. Blacks did not just "lose out" in politics in Burke County. They have never been a part of the political process there, they have no power to assert their interests, and they will remain impotent absent judicial relief.

B. This Case Differs Significantly From The Facts And Issues Presented in Bolden

Although plaintiffs satisfied the burden imposed by the *Mobile* plurality, they also contend that this case is significantly different than the *Mobile* decision, and a different level of proof is appropriate here. In *Mobile*, the trial court invalidated the City's historic "commission" government and replaced it with an entirely new structure. Mobile's three elected commissioners acted as executives, as well as legislative policy-makers. The at-large election was an inextricable part of the commission form of government. As the District Court noted in *Mobile*, executive commissioners had to be elected at-large because of the nature of their responsibilities. *Bolden v. City of Mobile*, 423 F. Supp. 384, 402 n.19 (S.D. Ala. 1976). Thus, to eliminate at-large elec-

tions, the *Mobile* plaintiffs had to prove that the very form of the City's government was unconstitutional.

The present case is much different because the form of government is not at issue. The Commissioners here are entirely a legislative, policy-making body. (T. 237) Burke County commissioners make policies and pass ordinances. (T. 453-54) The county administrator, who is appointed, is the executive arm of government and is responsible for carrying out the commissioners' policies. (T. 496) Burke's commissioners can be elected from districts without difficulty.[18]

Where the "entire system of local governance" is challenged, as in *Bolden*, purposeful discrimination is more difficult to prove because there often are other factors that would justify the local scheme. 446 U.S. at 70. But where the question of districting alone is at issue, no automatic, non-racial justification is present, and a discriminatory purpose is more easily shown. Proof is easier because any districting decision is largely the determination of which voters will have what political "clout" in electing representatives. This very point was made by Justice Stevens in his concurring opinion in *Bolden*. 446 U.S. at 87-88. Because the impact of a districting scheme is so intimately related to the purposes of the districting, the effects of the election system are particularly important in determining the legal purpose in a case such as the present one.

Bolden is also very different from this case because the trial court there had made its decision only on the basis of

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[18] As the Court of Appeals held:

> [T]his is not a case like *Mobile v. Bolden*, in which an entire form of government was abandoned without consideration of the valid local interests in the maintenance of the existing system. In this case, unlike *Bolden*, the Court's order does not affect the existing allocation of executive and administrative responsibilities among the Burke County commissioners. (J.S. 54a-55a)

"effects." See *Moore v. Brown*, 448 U.S. 1335 (1980) (opinion of Justice Powell). The District Court in *Bolden* had concluded that Blacks were "excluded" from the political process, but only because Blacks had not won office, and because there was bloc voting in Mobile. 423 F. Supp. at 387-89. In the present case, the exclusion of Blacks from the political process was found by the District Court, in detailed findings, to result from past and present purposeful discrimination.

Finally, appellees contend that proof of specific discriminatory intent should not be necessary in a case such as the present one. In *White v. Regester*, 412 U.S. 755 (1973), this Court unanimously struck down multi-member legislative districts in two Texas counties. Unlike the present case, there was no finding that the multi-member districts were retained because of racial motives. Purposeful discrimination was proved in *White v. Regester*, but it was of a different kind. The plurality opinion in *Bolden* identified the factual proof in *White* as a "long history of official discrimination," legislative "indifference to minority needs," and the restricted "access of minority groups to the political process." 446 U.S. at 69. In Dallas County, this last factor was proved because Blacks had not been supported politically by a private citizen's group, and were thus less able to win county-wide election. In Bexar County, the evidence was simply the cultural barriers that impeded Hispanics' participation in the political process.

Thus, *White v. Regester* held that a districting system cannot be used which excluded a racial group from the political process, and where their exclusion is a result of (1) the challenged apportionment scheme, and (2) the consequences of past or present purposeful discrimination. *White* did not focus on the specific intent behind the apportion-

ment scheme. Appellees contend that *White*, decided unanimously, should still be good law.[17]

C. The Other Issues Raised By Appellants Have No Merit

First, appellants contend that the Court of Appeals' emphasis on responsiveness was error. The Fifth Circuit held that unresponsiveness must be proved before plaintiffs can prevail. While it is true that this Court's decisions do not require such proof, that could only be a ground for complaint by an unsuccessful plaintiff who failed to satisfy this additional burden. Once the plaintiffs here overcame the burden of proving unresponsiveness, the Court of Appeals accorded this factor little evidentiary weight. The Fifth Circuit believed that unresponsiveness "is a factor of greater significance in its absence." (J.S. 47a n.41) Proof of unresponsiveness was considered only as some circumstantial evidence of intent. That inference is certainly not clearly erroneous in this case. As the Court concluded:

> Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke in every interaction

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[17] Similarly, an apportionment scheme may be enjoined as a remedial matter, regardless of purpose, where it perpetuates conditions flowing from past constitutional violations. State and local government have acted in concert here to extinguish black political activity. Quite clearly, as the District Court found, the effects of the long period of discrimination and oppression continue to this day. As a majority of this Court recently held in the Dayton and Columbus, Ohio school desegregation cases, the government has a continuing affirmative duty to eradicate the effects of discriminatory and segregative acts. Neutral actions, which may not independently be motivated for invidious purposes, are still illegal if they perpetuate the effects of past discrimination. *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). The same principal should apply here, as the United States argued below in its Amicus brief.

they have had with the White controlled bureaucracy. (J.S. 44a n.37)

Where discrimination is so pervasive and so rampant, this kind of "unresponsiveness" unquestionably provides some evidence to infer a discriminatory purpose in the use of at-large elections.

Second, appellants claim that various decisions of the Fifth Circuit are inconsistent. Even if true, that would hardly be grounds for reversal. But more importantly, this contention shows how appellants have misunderstood the ruling of the Court of Appeals in this case. In *McMillan v. Escambia County*, 638 F.2d 1239, 1247 n.16 (5th Cir. 1981), the Fifth Circuit held that *Zimmer* was "invalidated by *Mobile*." *McMillan* was decided before *Lodge*, and it clearly shows that the Fifth Circuit understands the import of *Mobile*. *Lodge*, like *McMillan*, expressly recognized that the *Zimmer* approach was rejected by the *Mobile* plurality. *Lodge* simply followed Justice Stewart's opinion and considered *Zimmer* evidence to the extent that it bore a direct evidentiary relation to the intent question.[18]

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[18] Appellants err when they argue that socioeconomics are irrelevant to this case. Contrary to their assertion, the lower courts here did not conclude that a disadvantaged group is "entitle[d] . . . to some special dispensation in the area of voting rights." (*Brief of Appellants* at 18) The tremendous socioeconomic disparity between Blacks and Whites is directly traceable, in substantial part, to slavery and past purposeful discrimination by the State of Georgia and Burke County government. (Robinson Depo. 64-65; J.S. 83a) As the lower courts found, these socioeconomic disparities directly impede the ability of Blacks to participate in the political process in Burke County. In *White v. Regester, supra*, far less evidence of socioeconomic depression among Hispanics was considered enough, without any further evidence, to invalidate a multi-member district. 412 U.S. 767-70. The socioeconomic picture in Burke County must be considered by a trial court that is attempting to assess the political realities of the county in determining the ultimate question of purpose.

Third, appellants cite testimony that at-large elections had not been a "political issue" before this case was filed. *Brief of Appellants* at 39. It is true that Blacks in Burke County have no capacity to make at-large elections a viable political issue there. It is equally true that, to the White politicians, Black unemployment is not an issue, the failure to appoint Blacks to boards is not an issue, the low level of Black voter registration is not of interest to them, and the exclusion of Blacks from every other phase of public life is "not a thing of interest." (T. 232, 241, 255-57, 256, 296, 306, 308, 392-98, 813) The fact that White politicians do not consider those things as issues, however, does not make them any less invidious or unconstitutional. Neither should the fact that Blacks cannot make at-large elections a political issue, without going to federal court, somehow excuse the defendants. It would be a strange rule that allowed a defense on the ground that Blacks are so excluded from politics that they cannot effectively assert the right to political equality.

Fourth, appellants seriously misrepresent the evidence in asserting that no electoral discrimination was shown, that Blacks have equal access to "slating" in the political process, and that Blacks themselves are the only group that conduct slating. The "slating" evidence in *White v. Regester* did *not* involve the ability of Blacks to get on the ballot, contrary to the representation of appellants. (*Brief of Appellants* at 30) Getting on the ballot in Dallas County was simple and straight-forward. The slating in Dallas County referred to the fact that a private civic organization carried substantial political clout in the County, and it supported relatively few Blacks (although it did slate some black candidates, and in those cases, it allowed black community leaders to select the candidates). *Graves v. Barnes,* 343 F. Supp. 704, 726 (W. D. Tex. 1972) The expulsion of Blacks from the political process in Burke County is dramatic by comparison. Blacks are excluded from the Demo-

cratic Party and the Democratic Committee, which is the one vehicle to election in Burke County.

Appellants claim that Black organizations conduct slating by publishing "tickets" for elections. No such finding was made. The only witness who testified from personal experience, testified that the "tickets" did not endorse candidates, but simply listed all candidates running in a given election. They were nothing more than sample ballots to educate Blacks—who had never been allowed to vote before in Burke County—what a ballot looked like. (T. 715-20)

Appellants assert that there has never been voting discrimination in Burke County. (*Brief of Appellants* at 33-35) Suffice it to say that this contention ignores the overwhelming evidence in the record, it ignores the findings and conclusions of two courts below, and it ignores the fact that none of these findings were challenged as clearly erroneous in the Court of Appeals.[19]

Finally, appellants discuss certain historical evidence relating to Burke County election laws. Appellees contend

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[19] Appellants also contend that the tremendous discrimination and segregation in Burke County education is irrelevant. *Id.* at 37. The county commissioners have not acted completely independently of the educational process in Burke County, as appellants state. To the contrary, the county commissioners got very involved in education when there was a threat to school desegregation. *Brief, supra,* at 16-17. The purposeful discrimination in education contributes to the exclusion of Blacks from the political process. Also, the attitudes of the White community and the government officials in other areas provide some evidence of the motivations behind at-large elections. As the trial court commented: "[School discrimination] may have some relevance to the attitude of whites in this county at times generally, on the question of segregation." (T. 61) The use of the evidence in that fashion is entirely proper. Most assuredly, had school integration been a smooth affair in Burke County, the appellants would be arguing that discrimination was a thing of the past in Burke County, that Whites did not object to integration, and that the District Court should have inferred from that fact a lack of discriminatory purpose in the use of at-large elections.

that this history is relevant because it shows that the very form of government was once before completely changed in Burke County for the specific purpose of eliminating Blacks. Since Blacks were an overwhelming majority of the County before the turn of the century (J.S. 83a n.18), and since Blacks were voting during Reconstruction, Blacks controlled county-wide voting at that time. They had all three of the county seats in the Georgia House of Representatives. Young, *The Negro in Georgia Politics*, 1867-1877 at 50 (Unpublished Thesis, Emory University Library, 1955) Since Blacks could similarly control the election of the ordinary, who was elected county-wide and who had governing authority over the County (*Brief of Appellants* at 41), the state legislature (which was dominated by Whites) simply eliminated elections. Instead, a board of commissioners was created to be appointed by the grand jury (Ga. Laws of 1873, p. 226) which did not include Blacks at that time. Young, *supra*, at 28. This historical sequence is stark, and it is explainable on no grounds other than race. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).[20]

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[20] Appellants raise two other arguments. They contend that vote dilution cases cannot be maintained against local governing bodies. That position is incorrect. The Thirteenth, Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965, apply with full force to local government, just as to state-wide bodies. Indeed, where intentional discrimination has been proved, as here, there could be no conceivable reason why the plaintiffs should not prevail.

Appellants also contend that they should have had an opportunity to submit an election plan under Section 5 of the Voting Rights Act. This contention was never raised in the Court of Appeals, and it is moot now in any event. The special election called for has passed, and how a remedy should now be implemented for future elections should be considered first by the District Court.

II. Statutory Election Cases May Be Maintained Without Proving Intentional Discrimination.

Appellees contend that they should prevail under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, without proving intentional discrimination. In *Mobile*, three Justices took no position on the statutory issue, and there was no majority view. The plurality concluded, after an admittedly "cursory examination," that Section 2 adds absolutely nothing to the law, that it requires proof of purposeful discrimination, and that it does not even apply to vote abridgement and dilution cases. 446 U.S. at 60-61.

The plurality's cursory conclusion was wrong, as is apparent if one simply compares Sections 2 and 5, and this Court's prior decisions. Sections 2 and 5 both cover the exact same kinds of electoral practices—namely, any "voting qualification or prerequisite to voting, or standard, practice, or procedure." This Court has held that that language includes at-large elections in a Section 5 case. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). Since the provision is identical in both sections, at-large elections are unquestionably covered by Section 2 as well.

The only question is what standard of proof is necessary in a Section 2 case. Here, no one can dispute that at-large elections exclude Blacks from the political process by perpetuating the effects of past discrimination, regardless of the subjective intentions that might motivate retention of the scheme. That should be enough to prevail in a Section 2 case.[21] *Compare Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (Chief Justice Burger); *City of Rome v. United*

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[21] One could also argue that Section 2 reaches any discriminatory effects, even if they do not result from past discrimination. That issue need not be reached here in light of the evidence and findings in this case.

States, 446 U.S. 156 (1980). The United States asserted its agreement with this position in its Amicus brief in the Court of Appeals. The legislative history supports it entirely. The whole purpose of the Act was "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination . . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs." 111 Cong. Rec. 8295 (1965) (Sen. Javits).

Nothing in the language of the Act or the legislative history suggests that the broad language of Section 2 was aimed only at intentional discrimination. While Section 2 does not expressly incorporate either a "purpose" or an "effect" test, the Voting Rights Act did specify a particular test on ten other occasions that appear in eight separate provisions. (Sections 3(b), 3(c), 4(a), 4(d), 5 and 10(a)(iii)). In each instance, Congress condemned "tests," "devices" and "voting practices" used "for the purpose *or with the effect*" of "denying or abridging the right to vote on account of race or color." In no instance did Congress require proof of purpose in addition to effect. To read an intent requirement into Section 2 would fundamentally rewrite the section in a way that is inconsistent with everything else in the Act.

This Court has held that Section 5 of the Voting Rights Act should be given the "broadest possible scope" in order to reach "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 38 (1978). Congress has approved this Court's broad readings of Section 5. *Id.* at 39-40. Congress could not have meant for this Court to turn around and read Section 2 so narrowly that it means absolutely nothing, which is precisely what Justice Stewart did. Under his view, Section 2 is a hollow reenactment of the prohibi-

tions already contained not only in the Constitution, but also in 42 U.S.C. §1971(a)(1), which provides that citizens "shall be able to vote . . . without distinction of race."[22]

All of the legislative history supports plaintiffs' position. In the only instance where the standard of proof under Section 2 was expressly discussed, Attorney General Katzenbach stated that it reached all procedures with the "purpose or *effect*" of discrimination.

> I had thought of the word "procedure" as including any kind of practice of that kind if its purpose *or effect* was to deny or abridge the right to vote on account of race or color. (Emphasis added) *Hearings on S.1564 before the Comm. on the Judiciary*, United States Senate, 89th Cong., 1st Sess., 191 (1965) [hereinafter, "*1965 Senate Hearings*"].

The plurality opinion in *Mobile* relies on the evidence that Section 2 was designed basically to reach Fifteenth Amendment violations. Since the plurality felt that the Fif-

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[22] By comparison, Title VII requires a finding that the "respondent has *intentionally* engaged in or is *intentionally* engaging in" discrimination. That provision has been interpreted to prohibit discrimination regardless of motive. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Section 2 is obviously less of a "motive" statute than Title VII. It speaks of practices that are "imposed or *applied*" that "deny or abridge" the right to vote. These are not "intent" terms, particularly in comparison with the language of Title VII.

Other evidence supports the plaintiffs' view. The Conference Committee on the Voting Rights Act specifically deleted from the criminal provisions any requirement that a defendant act "wilfully and knowingly" or "fraudulently," limitations that had been included in the Senate bill. *U.S. Code, Cong. & Admin. News* 2581 (1965). The Senate had tried to include those restrictions simply "to make it clear, for example, that no criminal violation is involved where a person acts inadvertently." *Id.* at 2567. The Senate position was rejected. Given this stringent criminal provision, "intent" and "purpose" should hardly be read into the *civil* remedy under Section 2.

teenth Amendment reached only the most blatant kinds of intentional voting discrimination, they concluded that Section 2 was similarly limited. It is true that Congress largely equated Section 2 with Fifteenth Amendment prohibitions. But the plurality's conclusion is wrong because, in equating the two, Congress held a far different concept of what the Fifteenth Amendment meant than the *Mobile* plurality. The testimony and debates are replete with comments which show that Congress understood the Fifteenth Amendment to ban practices that had the *effect* of discriminating. See, e.g., *1965 Senate Hearings*, at 194, 236 and 239; *Hearings on H.R. 640 before Subcom. No. 5 of the Com. on the Judiciary*, House of Reps. 89th Cong., 1st Sess. at 50, 59-61 (1965) [hereinafter, *1965 House Hearings*]; 111 Cong. Rec. 10453-54 (Sen. Prouty), 10456 & 11402-05 (Sen. Hart); 11744-47 (Sen. Saltonstall); and 8296 (Sen. Mansfield).

Attorney General Katzenbach's testimony is especially persuasive in construing the Voting Rights Act because he was so intimately involved in "drafting the statute and explaining its operation to Congress." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 131 (1978). Mr. Katzenbach time and again equated the Fifteenth Amendment with a purpose or effect test. For example, he believed that Sections 4 and 5, which expressly use "purpose or effect" tests, just covered Fifteenth Amendment violations. When testifying before the House on the Section 5 preclearance provision, he stressed that "the only laws that are struck down in this are those that are in violation of the 15th amendment." *1965 House Hearings* at 90. To satisfy Section 5, the State or local government had only to show "the court that the new provision is constitutional." *Id.* at 94. See also *id.* at 102; H.R. Rep. No. 439, at 19; S. Rep. No. 162, at 19.

Thus, Congress did largely equate the scope of Section 2 with the Fifteenth Amendment, but Congress also equated

Section 5 with the Fifteenth Amendment. Congress understood all three to include acts with the *effect* of discriminating. Section 2 and Section 5 were identical in their substantive coverage. They differed only in that Section 5 required proof of nondiscrimination *before* a change could be effected.

This view has been confirmed implicitly by subsequent actions of Congress. While space does not permit a discussion of all this legislative history, nor of all the 1965 history, much of it is set out in the United States Amicus Brief that was filed below.

The action of the House in 1981 explicitly confirms the historical record. Reacting to Justice Stewart's reading of Section 2, the House passed a specific amendment to make it clear that intent is not required under the law. At the same time, the House stated unequivocally that the amendment was only a clarification. Section 2 was never supposed to require proof of intent.[23]

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[23] The Committee does not agree with [Justice Stewart's] construction of Section 2 and believes that the intent of the section should be clarified.

. . . . .

The purpose of the amendment to section 2 is to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice.

. . . . .

By amending Section 2 of the Act Congress intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it. H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 29-30 (1981)

Finally, Sections 2 and 5 should be read the same if only to avoid the absurd consequences of reading them differently. Acting under Section 5, this Court has already invalidated at-large elections in Wilkes County, Georgia, which is adjacent to Burke County. *Wilkes County v. United States*, 439 U.S. 999 (1978). The evidence of discrimination in Wilkes County was trifling by comparison to the present record. It would be wholly irrational to hold that the same election system is legal in Burke County, where the only difference is the date of adoption, because an entirely different legal test applies under Section 2. To make the date of enactment determinative would be especially ironic since Blacks were not even a part of the political process that led to the adoption of at-large elections in Burke County in 1911. Congress did not intend to create such a hodge-podge, and this Court should not construe the Act to produce such inconsistencies.

III. The Judgment of the Lower Court Should Be Affirmed On The Basis Of the Fifteenth Amendment

The Fifteenth Amendment was misconstrued in *Mobile*. The plurality concluded that it was inapplicable because the District Court had found that Blacks "register and vote without hindrance." 446 U.S. at 65. By limiting the Amendment to cases where the right to vote is absolutely denied, Justice Stewart's opinion rewrites the Amendment by deleting the words "or abridged." Justice Stewart also concluded that the Fifteenth Amendment required proof of purposeful discrimination. The plurality view would read the Amendment out of the Constitution. There is no situation where it would apply, that would not already be unconstitutional under the Fourteenth Amendment.

While Justice Stevens concluded that the Fifteenth Amendment reaches dilution cases, that opinion would also appear to be at odds with the literal text of the Constitu-

tion. Justice Stevens believed that the Constitution "must apply equally to all forms of political gerrymandering—not just a racial gerrymandering." 446 U.S. at 86. Justice Stevens' position cannot be supported by the express language of the Constitution. The Fifteenth Amendment does not apply to "political" gerrymandering. It applies solely to electoral practices, be they gerrymandering or otherwise, that discriminate on the basis of race. Whatever may be the standard for testing an apportionment scheme challenged on political grounds, the test must be broader when the challenge is based on race. That follows directly from the fact that there is a specific amendment dealing with the denial *or abridgement* of the right to vote on account of race.

Opponents of the Fifteenth Amendment complained in 1869 that it would invade states' rights by making the right to vote subject to federal judicial and congressional protection. The opponents were defeated, and their arguments were rejected. They should not be given a belated victory one hundred and ten years later by this Court construing the Fifteenth Amendment to mean nothing.

The supporters of the Amendment were convinced that it was necessary to insure "against oppression" of black people. 40 Cong. Globe 668 (1869) Senator James Dixon of Connecticut was typical in stating that the Fifteenth Amendment was an especially important addition to the Constitution.[24] Proposed amendments with narrower lan-

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[24] "[I]t rises far above the question of any mere detail as to suffrage; far higher in importance than the question even of abolishing slavery in the States; far higher than any proposition which has ever been made with regard to the amendment of the Constitution, because it is in its truest sense radical and revolutionary. It strikes at the very root and foundation of the Government; it removes its cornerstone, and changes the entire character of the State governments." 40 Cong. Globe 668 (1869).

guage were made, and rejected, in favor of the Fifteenth Amendment with its broad "deny or abridge" prohibition.

The Fifteenth Amendment was intended to be a broad prohibition reaching beyond the Thirteenth and Fourteenth Amendments. It should be construed to reach the overwhelming evidence in this case that black people are not allowed a reasonable opportunity to participate in the political process, and to hold office, in Burke County.

IV. The Judgment Of The Lower Court Should Be Affirmed On The Basis Of The Thirteenth Amendment

Last term, this Court found that the Thirteenth Amendment was not implicated in a case where a municipal street had been closed. *City of Memphis v. Greene*, 101 S.Ct. 1584 (1981). That case left open the question of whether proof of purposeful discrimination is necessary under the Thirteenth Amendment, and the question of what is made illegal by the force of Section 1 of the Amendment.

In a case such as the present one, there should be no requirement of proving specific intent to discriminate under the Thirteenth Amendment, or the promise of that Amendment will remain unfulfilled. There were two fundamental characteristics of slavery. One was the complete elimination of the slaves' political rights. The other was the subjugation of slaves economically. This case deals principally with the former.

Absent judicial relief, Blacks will not enjoy the "universal civil and political freedom" envisioned by the Amendment. *Civil Right Cases*, 109 U.S. 3, 20 (1883) Except for the short interlude of Reconstruction, Blacks have never enjoyed meaningful participation in the political process in Burke County. They have been denied political equality by a combination of private and governmental actions. The Thirteenth Amendment, of course, reaches private conduct.

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). For that reason, neither the concept of *de jure* discrimination, nor purposeful discrimination, should have any place in the Thirteenth Amendment in a case such as the present one.

The Thirteenth Amendment was not passed simply to abolish the formalisms of slavery. It was designed instead to accomplish broader purposes, and "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody code; its dark, malignant barbarizing spirit." 38 Cong. Globe 1319-24 (1864). The framers intended the Amendment to do more than simply free the slaves who were still in bondage at the time. tenBroeck, *The Thirteenth Amendment to the United States Constitution*, 39 Cal. L. Rev. 171, 180 (1951). Nowhere do the debates reveal any language limiting the construction of the Amendment to formal slavery *per se*.

The vestiges of slavery are most assuredly present in Burke County. The District Court was explicit in its finding that the "vestiges of slavery" exist here (J.S. 95a), and the Court of Appeals concluded much the same thing. (J.S. 55a). The promise and command of the Thirteenth Amendment have been only partly fulfilled in Burke County. Since 1864 and their defeat in the Civil War, the white people in Burke County have continued to oppose full and equal rights for black people by every means at their disposal. They have been very successful, and the "badges and incidents" of slavery remain very much in place. Until they are eliminated, the command of the Amendment has not been met.

CONCLUSION

Appellees respectfully pray that the judgment of the Court of Appeals be affirmed.

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OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,

Appellants,

versus

HERMAN LODGE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE NO.
Table of Authorities	ii
(1) Section 2 Of The Voting Rights Act Does Not Impose A Discriminatory Impact Standard.	1
(2) Adoption Of At-Large Voting During The 1960's Does Not Establish Intentional Discrimination	7
(3) Factual Misstatements In Appellees' Brief And The District Court's Opinion	9
Conclusion	18

TABLE OF AUTHORITIES

CASES	PAGE NO.
Allen v. State Board of Elections, 393 U.S. 544, 568-9	4
Avery v. Midland County, 390 U.S. 474 (1968)	8
Baker v. Carr, 369 U.S. 186 (1962) . .	8
Beal v. Doe, 432 U.S. 438, 444 (1977).	2
Beer v. United States, 425 U.S. 130, 141 (1976)	6
Black Voters v. McDonough, 565 F2d 1, 2 (C.A. 1st 1977)	6
Commonwealth of Kentucky v. Rucklehaus, 362 F. Supp. 360, 365 (D.C. Ky. 1973)	3
Crawford v. Burke, 195 U.S. 176, 190 (1904)	3
Davis v. Thomas County, 380 F2d 93 (C.A. 5th 1967)	8
Dusch v. Davis, 387 U.S. 112 (1967) .	8
Feldman v. Philadelphia Nat. Bank, 408 F. Supp. 24 (D.C. Pa. 1976) . . .	3
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	7
Hadley v. Junior College District, 397 U.S. 50 (1970)	8
International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354, f.n. 29 (1979)	5
Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288, Note 22 (1956) . .	5
Mobile, City of, v. Bolden, 446 U.S. 55, 60 (1980)	6

NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964) 5

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951) 5

Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). . . . 2

Tennessee Valley Authority v. Hill, 437 U.S. 153, 193 (1978). 5

United States v. Clark, 445 U.S. 23, 33, f.n. 9 (1980). 5

United States v. Uvalde Consolidated School District, 461 F. Supp. 117, 123 (D.C. Tex. 1978). 2

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Washington v. Finlay, 664 F2d 913 (C.A. 4th 1981). 1

Whitcomb v. Chavis, 403 U.S. 124, 157, Note 37 (1971). 7

Woodwork Mfgrs. Assn. v. NLRB, 386 U.S. 612, 639-640 (1967). 5

MISCELLANEOUS

Hansen, Danger in Washington. 11

Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L.R. 790 (1968). 6

2A Sutherland, Statutory Construction, §47.23 (1973). 2

NO. 80-2100

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,

Appellants,

versus

HERMAN LODGE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF APPELLANTS

(1) Section 2 Of The Voting Rights Act Does Not Impose A Discriminatory Impact Standard

This agreement is made by Appellees and a number of the Amici.

The Court of Appeals rejected this contention in this case, 639 F2d at 1364, f.n. 11 (J.S. 10a), and there was no cross appeal. It was also recently rejected in Washington v. Finlay, 664 F2d 913 (C.A.

4th 1981).

"The starting point in every case involving construction of a statute is the language itself." Beal v. Doe, 432 U.S. 438, 444 (1977); Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). Section 2 uses the terms "deny and abridge", and as observed in United States v. Uvalde Consolidated School District, 461 F. Supp. 117, 123 (D.C. Tex. 1978), these terms connote intent or purpose.

Secondly, the terms "deny or abridge" reflect the wording of the Fourteenth, and specifically, the Fifteenth Amendment, and they traditionally have carried a discriminatory intent connotation.

Thirdly, when Congress intended to adopt a disparate impact standard in the Act, it expressly so declared in Sections 3, 4 and 5. The pointed use of the term "effect" in these sections, and its omission in §2, evinces a deliberate decision to give Section 2 a different meaning, under the rule that where certain words are used in one part of an act, and omitted in another, the presumption is that the difference was intentional. 2A Sutherland, Statutory Construction,

§47.23 (1973); Commonwealth of Kentucky v. Rucklehaus, 362 F. Supp. 360, 365 (D.C. Ky. 1973); Feldman v. Philadelphia Nat. Bank, 408 F. Supp. 24 (D.C. Pa. 1976); United States v. Wiltberger, 5 Wheat 76, 5 L.Ed.37, 45 (1820). "A change in phraseology creates a presumption of a change of intent." Crawford v. Burke, 195 U.S. 176, 190 (1904).

Fourthly, the statement of Attorney General Katzenbach relied on by Appellees, is not determinative. The statement should be read in context. The Attorney General was not asked the specific question as to whether §2 adopted an impact or effect test, but whether the word "procedure" as used therein would cover a case where a political subdivision hardly ever opened its registration office. The Attorney General replied, "I suppose that you could if it had that purpose",[1] clearly an assertion of an intent requirement. Immediately following, the Attorney General proceeded to paraphrase the Section, and in so doing, used the word "effect", but the casualness of his

1. Hearings Before The Committee On The Judiciary, United States Senate, 89th Congress, 1st Sess., on S 1564, p. 191 (1965).

remarks here indicate that he was confusing the language of Sections 3, 4 and 5 with that of Section 2, making particularly applicable what this Court held in Allen v. State Board of Elections, 393 U.S. 544, 568-9: " . . . In any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can be conclusive." In so doing, this Court rejected a statement of the Assistant Attorney General to the effect that Section 5 was intended to be limited to registration and voting.

Arrayed against this is the statement of Senator Dirksen, reiterated twice and concurred in both times by the Attorney General, to the effect that §2 was merely a restatement of the 15th Amendment.[2]

It is also argued by Amici that in rejecting bills in 1970 and 1975 which would have repealed Section 5 and substituted a new, "effect" standard, Congress relied on statements that Section 2 already accomplished the same thing (Brief of Georgia Association of Black Elected

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2. Id., pp. 171, 208 (1965), cited by this Court in Mobile (446 U.S. at 61).

Officials et al, pp. 14-16). As Amici concede, however, "The views of members of a later Congress . . . are entitled to little, if any, weight," International Brotherhood of Teamsters v. United States, 431 U.S. 424, 354, f.n. 39 (1979); Tennessee Valley Authority v. Hill, 437 U.S. 153, 193 (1978); United States v. Clark, 445 U.S. 23, 33 f.n. 9 (1980), and more significantly, these statements were made in opposition to pending legislation, not in support, and this Court has many times held that the statements of opponents of legislation as to meaning are not to be relied upon. Woodwork Mfgrs. Assn. v. NLRB, 386 U.S. 612, 639-640 (1967); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951); NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288, Note 22 (1956).

Lastly, this Court should not construe Section 2 as having an "impact" or "effect" standard absent more compelling language or legislative history requiring that construction. To begin with, Section 2, because of its universal, permanent application, may well not be subject to the limiting construction placed on the

"effect" language of §5 in Beer v. United States, 425 U.S. 130, 141 (1976), as being designed to prohibit changes which lead to retrogression. An unqualified impact law would place in doubt election codes, governmental structures and districting schemes for congressional, state legislative and local political subdivision bodies all over the nation. At-large voting itself is a rational election method, serving valid interests and is also a simplified way of satisfying the one-man, one-vote requirement in many jurisdictions. It is in wide use throughout the United States. Of the 50 largest school boards in the United States, 32 use at-large voting. Black Voters v. McDonough, 565 F2d 1, 2 (C.A. 1st 1977). Almost two-thirds of all cities elect their councilmen at-large. As to counties, 40% elect at-large, and another 20% elect the presiding officer at-large, and the recent trend is toward at-large elections. Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L.R. 790 (1968). See also, City of Mobile v. Bolden, 446 U.S. 55, 60 (1980). As of 1970, 46% of the upper houses and 62% of the lower

houses of state legislatures, contained some at-large seats. Whitcomb v. Chavis, 403 U.S. 124, 157, Note 37 (1971).

An "effect or impact" standard not only will vary from year to year, depending upon the facts upon which it operates, but it would produce different results in different parts of the state. Indeed, such a standard would subject to judicial scrutiny, the voter and candidate qualification laws throughout the country, and very likely require that they be validated in the same manner as employment tests under the effect standards of Title VII. Compare Griggs v. Duke Power Co., 401 U.S. 424 (1971).

(2) Adoption Of At-Large Voting During The 1960's Does Not Establish Intentional Discrimination

Appellees argue that the fact that a number of Georgia Counties changed to at-large voting during the 1960's, following enactment of the Voting Rights Act, is evidence of intentional discrimination. (Brief, p. 31). This is not so. As this Court observed in Whitcomb v. Chavis, 403 U.S. 124, 157, f.n. 37 (1971). "[T]here is no doubt that some states switched to

multi-member districts as a result of those (reapportionment) decisions. That is what happened in Georgia. Baker v. Carr was decided March 26, 1962. In Dusch v. Davis, 387 U.S. 112 (1967), this Court held that assuming but not deciding that the one-man, one-vote principle applied to political subdivisions,election of the members at-large from residency districts would satisfy the Constitution. About this time, speculation was high that the one-man, one-vote principle was going to be held applicable to political subdivision bodies, as this Court later did in Avery v. Midland County, 390 U.S. 474 (1968), and Hadley v. Junior College District, 397 U.S. 50 (1970). This issue was raised in a case involving Thomas County, Georgia. The district court in that case held on June 22, 1966, that at-large voting of commissioners running from unequally-populated districts satisfied the Constitution, and the Court of Appeals affirmed on June 26, 1967. Davis v. Thomas County, 380 F2d 93 (C.A. 5th 1967). This prompted many counties which had district election arrangements involving unequal districts, to simply amend their district laws so as to retain the districts, but to require

at-large voting. That is precisely the case with respect to the 18 counties referred to in Appellee's trial brief, pages 13-14 (R. 398-99). The Thomas County case indicated a simple means for counties having malapportioned districts to comply with the law.

(3) Factual Misstatements In Appellees' Brief And The District Court's Opinion

Appellees' Brief devotes 23 pages to reviewing evidence, mostly on matters not relating to voting. A number of misstatements are contained therein, which require response:

(1) A defendant's witness stated the only reason he could think of for the at-large voting was the desire to prefer one race over another (Brief, p. 20). What the witness said was that the only purpose of changing from at-large voting to a district basis would be in order to favor one race over the other (T. 101).

(2) If you could not pass the literacy test, you would be subjected to Georgia's question and answer test, and that a significant number of blacks tried that test, citing (T. 812-13) (Brief, p.

3). The witness did not say that "a significant number of blacks" tried the test, and more significantly, she doesn't recall a single black person every failing Georgia's literacy test (T. 802). She further testified that the office always followed the same procedure for whites and blacks (T. 803).

(3) Throughout Appellees' brief, reference is made to the fact that there was more vigorous opposition to school desegregation in Burke County than any other county in Georgia, and that there was much fear on the part of blacks and whites concerning desegregation (Brief, pages 2, 10, 11, 15 and 16). These statements are based upon the testimony of Mrs. Frances Pauley, who testified that she came to Burke County about 6 times in 1967 when desegregation was just beginning (T. 110-134). The fact is, however, that these apprehensions did not prove to be true, for it appears that the white school population in Burke County decreased only 6 percentage points, from 28.85% of the total before desegregation, to 22% after (T2. 81). This means that in fact, desegregation worked better in Burke County than it did in Washington, D.C., where

the white school population dropped from around 50% to less than 15% (See Hansen, Danger in Washington), or in Atlanta, Georgia, where the white school population has dropped from 60% before desegregation, to around only 10% at the present.

(4) Before the Voting Rights Act, blacks were virtually eliminated from voting, citing (J.S. 71a-71)(Brief, p. 3). There is no evidence that blacks were eliminated. The reference to the Court's opinion was merely to the effect that blacks were not registered in large numbers prior to the Voting Rights Act. The testimony was undisputed that they had never had any trouble registering, voting or running for office. See Appellants' Brief, pp. 33-34, for discussion and citations).

(5) To this day, voter registration has been made as difficult in Burke County as possible (Brief, p. 4). There is no evidence whatever to this effect. Indeed, the evidence is to the contrary for it shows that at the request of plaintiffs, the County officials opened up 3 new registration sites which were not really needed.

(6) The districts adopted by the Democratic Executive Committee for electing members of the Executive Committee all had white voting majorities, citing (T. 534-42, 891-92) (Brief, p. 9). The testimony does not support this assertion.

(7) In the few years before this case was filed, black people were shot at in Burke County for seeking equal rights, citing (T. 113, 125-6, 134, 682-83). The one incident referred to, however, was not the action of an organized group, but of a single individual who was ruled mentally incompetent and was sent to prison for shooting his father-in-law and stabbing his wife (T. 154, D.E. 73).

(8) Blacks are rarely appointed to boards or commissions. (Brief, p. 11). The evidence, however, shows the following black appointments:

2 black members, Recreation Commission (T. 857, 875)

2 members, Democratic Executive Committee (T. 890-1)

George Williams, registrar (one of 3 registrars), succeeded a prior black appointee (T. 940, T2. 188)

Joe Lewis, Department of Family & Children's Services (T2. 188-9)

(Now, 3 of the 5 board members are black)

Marvin Mobley, black, nominated for DFCS board (D.E. 54, 2nd Page)

Samuel Stone, Planning Board, CSRA (T2. 189), and Jury Commission (T2. 190, D.E. 22)

Three black deputy sheriffs (T2. 191)

Mr. Hankerson, appointed to head youth program, with 2 black counselors (T2. 192)

Arthur Stewart, Neighborhood Youth Corps Director (T2. 196-7)

Watson Blount - Board of Registrars (D.E. 19)

Clifford Jones - Board of Registrars (D.E. 20; T2. 188)

Alvin Robinson, Jury Commission (D.E. 23)

John M. Ellis, Board of Education (D.E. 24; T. 79)

Calvin Thornton, CSRA Board (T. 290, 825)

Porter Anderson, Youth Summer Program (T. 825-6)

Elizabeth Carter, Hospital Authority Board (Appointed after trial)

(9) Throughout Appellees' brief, the argument is made that Burke County

has not been responsive to the needs of blacks. The district court so found (J.S. 77a). Appellants submit that this finding was clearly erroneous, as they did below (Brief of Appellants in Court of Appeals, pp. 2, 30). The Court below completely disregarded undisputed evidence that the Commissioners:

(a) Established 3 new registration sites at the request of blacks (P.E. 105, D.E. 4; T2. 193).

(b) Denied a beer license to a white which was opposed by blacks. (D.E. 48, 49).

(c) Authorized a survey of land lots in Gough at request of a black citizen (T2. 134).

(d) Furnish administration costs for handling CETA employees, and allocate CETA employees to black programs, and a black private school, Boggs Academy (T. 180, T2. 186-7, 201).

(e) Provided $150,000 to purchase a building for the Burke County Training Center (Mentally retarded) which serves mostly black (T2. 203, D.E. 7, 49, 50).

(f) Allocated $8000 to Child Day Care Center (D.E. 9, T2. 204, 151); and $6770 on another occasion (T2. 227, explaining P.E. 244).

(g) Applied to HUD and EDA for a grant to move deteriorated housing (T2. 210).

(h) Approved a county transportation program which was worked out in detail with the county's obligations defined specifically (T2. 37, T2. 221; D.E. 71). A prior program was rejected because no details were presented, and it would have imposed great expense on the county in 2 years (T. 829-834; T2. 220, 169; D.E. 6).

(i) Do grading and repair ditches at 12 black churches (T2. 215-216).

(j) The County has at least 16 unpaved roads which serve predominantly white areas (T2. 212-215, 219). Plaintiffs identified 17 roads which indicate either paving only for white areas, or lack of paving in black areas (T. 700-705; 616-619). Four of these roads which were paved to a white residence, however, were not done by the Commissioners, but were political roads provided by past governors to political friends (T2. 216-7).

(k) Participate in a recreation program providing $30,000 annual operating funds (T. 858, 729; T2. 194; D.E. 51, 52,

68), and $43,000 for a new building (T. 864) and allocates CETA employees for the program (T. 858).

(l) Recently paved 2 roads in predominantly black areas (T2. 208-209).

(m) Joined the CSRA Manpower Council to get funds (D.E. 8).

(n) Paved the streets in Gough, a predominantly black community in 1976-77 (D.E. 68; T. 132).

(o) Approved these programs benefitting blacks:

(1) Weatherization Program, whereby homes are repaired against the elements (T. 338; T2. 178)

(2) Emergency Program to pay past-due utility bills (T. 331)

(3) Dental program for kindergarten and first grade, 85% of clients are black (T. 963-4)

(4) Prenatal program - one of few counties having this (T. 965; T2. 8, 22)

(5) Transportation by Health Department of persons needing it for other programs (T. 966, 973)

(6) WIC program, supplemental food for ages 1-18, milk, cheese, etc. (T. 966, 175)

(7) Infant clinic (T. 968)

(8) Counseling program for parents (T. 969)

(9) Early Periodic Screening, Diagnosis and Treatment Program (EPSDT) Free health examinations (T. 970)

(10) Clinic at Gough (T. 975)

(11) Clinic at Vidette (T. 976)

(12) Clinics at Sardis and Midville (T. 977)

(13) Mental health program (T2. 9)

(14) High blood pressure clinic (T2. 3)

(15) Transportation program by DFCS to Augusta (T2. 48, 52)

(16) Provides 2 employees, and pays costs of administering food stamp program (T2. 58-63; T2. 184, 205)

(17) DFCS emergency fund for food and medicine (T2. 59, 836, 140)

(18) Migrant farm worker programs (T2. 64)

(19) County provides much more than required by the Hill-Burton committment for free hospital services to indigent, 82% of whom are

black (T2. 124)

(20) Rural Health Initiative Program approved (T2. 126, 920, 927)

(21) OIC Program, brick mason course in Midville (T2. 198; D.E. 10, p. 2)

(22) Feed-A-Kid Program, money and other contributions (T2. 200; D.E. 11)

(23) Senior Citizens' Hot Meal Program (T2. 203)

(24) Dermatology Clinic (Dr. Abalee) (Dep. of Dr. Byne, p. 13 and T. 919).

CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

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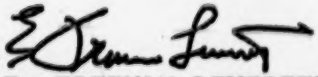

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QUENTIN ROGERS, et al.,
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ON APPEAL FROM THE UNITED STATES
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MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLEES HERMAN LODGE, et al.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLEES HERMAN LODGE, et al.

Pursuant to Supreme Court Rule 36.3, the Center for Constitutional Rights (CCR) respectfully moves for leave to file the attached Brief *Amicus Curiae* in support of Appellee Herman Lodge et. el., in the above captioned case.* CCR is a non-profit legal and educational corporation dedicated to advancing and protecting the rights and privileges guaranteed by the United States Constitution. CCR has litigated numerous cases involving the voting rights of minorities and believes that affirmance of the decision of the Fifth Circuit in the case at bar is necessary to assure effective participation in the political pro-

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* As the attached letters indicate, Appellants have refused to provide their consent, thereby making this motion necessary. See, Appendix at 1a.

cess by minorities who have historically been victims of racial discrimination.

In the attached brief, *Amicus* has argued in concise manner that the criteria outlined in *Zimmer* v. *McKeithen* 485 F.2d 1297 (5th Cir. 1973) aff'd sub nom., *East Carroll Parish School Board* v. *Marshall* 424 U.S. 636 (1976), is sufficient to establish an inference of purposeful discrimination in the retention of the Burke County at-large voting system, and that the *Zimmer* factors are consistent with proof of discriminatory purpose as elucidated in this Court's previous cases. *Amicus* has had the oportunity to read the *Brief of Appellees* and believes that an issue which troubled the plurality in *Bolden*, the link between "evidence of discrimination", and "evidence of the constitutional invalidity of the electoral system" 446 U.S. at 74, deserves more elaborate treatment than Appellees were able to provide because of their need to outline the wealth of factual data presented in the case. *Amicus* has argued that in the circumstances present today in Burke County, there is a direct line from the willful failure of elected white officials to represent Blacks, to the maintenance of the electoral system that enables continued discrimination. Once this connection is recognized, the need for retaining the essence of the *Zimmer* test becomes apparent.

For the foregoing reasons, *Amicus* prays that this motion for leave to file its brief be granted.

Respectfully submitted,

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Interest of *Amicus Curiae*

The Center for Constitutional Rights is a non-profit, legal and educational corporation dedicated to advancing and protecting the rights and privileges guaranteed by the United States Constitution. CCR belives that affirmance of the decision of the Fifth Circuit in the case at bar is necessary to assure participation in the political process by minorities who have historically been victims of racial discrimination. The case is particularly important to CCR because this Court's decision may determine the extent to which minority voting rights continue to be protected by provisions of the United States Constitution. Current indications that the Voting Rights Act may soon be changed persuade CCR that renewed attention must be focused upon voting guarantees that are constitutionally based and not subject to continuously shifting political currents.

TABLE OF CONTENTS

PAGE

Interest of *Amicus Curiae* iii

Introduction and Summary of Argument 1

ARGUMENT:

I. The Fifth Circuit Correctly Read *Bolden* As Holding That The *Zimmer* Criteria Is Still Sufficient To Establish An Inference Of Purposeful Discrimination In The Retention Of The Burke County At-Large Voting System 3

II. Purposeful, Systematic Exclusion Of Minority Citizens From Participation In The Process Of Local Governance Requires A Remedial Invalidation Of The Unconstitutional Electoral System Which Sustains The Ability To Exclude 13

CONCLUSION 16

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 (1962) 1

Burns v. *Richardson*, 384 U.S. 73 (1966) 1

City of Mobile v. *Bolden*, 446 U.S. 55 (1980) .. 2, 3, 4-5, 11, 14

Civil Rights Cases, 109 U.S. 3 (1883) 6

Columbus Board of Education v. *Penick*, 443 U.S. 449 (1979) 5, 10

Dayton Board of Education v. *Brinkman*, 443 U.S. 526 (1977) 5, 10

Fortson v. *Dorsey*, 379 U.S. 433 (1965) 1

PAGE

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 14

Jones v. *Alfred H. Mayer*, 392 U.S. 409 (1968) 6

Keyes v. *School District No. 1*, 413 U.S. 205 (1973) 13

McMillan v. *Escambia County*, 638 F.2d 1239 (5th Cir. 1981) 4

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977) 3, 8

Palmer v. *Thompson*, 403 U.S. 217 (1971) 13

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 3, 7, 8, 9

Reynolds v. *Sims*, 377 U.S. 533 (1964) 1

United States v. *O'Brien*, 391 U.S. 367 (1968) 13

Village of Arlington Heights v. *Metropolitan Development Corp.*, 429 U.S. 252 (1977) 3, 7-8

Washington v. *Davis*, 426 U.S. 229 (1976) .. 3, 7, 8, 9

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 1

White v. *Regester*, 412 U.S. 755 (1973) 1-2, 9, 10, 11, 12

Zimmer v. *McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom.*, *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) 2, 10, 11, 12

Constitutional Provisions:

Thirteenth Amendment to the United States Constitution 6

Fourteenth Amendment to the United States Constitution 1, 2, 3, 6

Fifteenth Amendment to the United States Constitution 4, 6

PAGE

Other Authorities:

Congressional Globe, 38th Congress, 1st Session at 2987 (1864) 6

Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973) 4

Ely, John Hart, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1207 (1970) 13

Wigmore, J., *A Treatise on the Anglo-American System of Evidence in Trials of Common Law*, §§ 2486-91 (3d ed. 1940) 13

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF HERMAN LODGE, *et al.*

Introduction and Summary of Argument

For almost twenty years since the landmark decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court has, in a series of cases, recognized that impairment of the right to vote, through debasement or dilution, could violate the Fourteenth Amendment rights of distinct groups of citizens. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In *White* v. *Regester*, 412 U.S. 755 (1973) this Court for the first time upheld a claim of unconstitutional vote dilution brought by a

group of minority citizens. There, citing language from *Whitcomb* v. *Chavis*, this Court held that:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *White* v. *Regester*, 412 U.S. at 766.

In the same year the Fifth Circuit, closely following this Court's reasoning in *White* and *Whitcomb*, set out a nonexhaustive list of the kind of findings that would underpin a successful claim of unconstitutional vote dilution. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom., East Caroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) a plurality of this Court held that only a purposeful dilution would offend the Fourteenth Amendment and stated that *Zimmer* was "decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the equal protection clause . . ." 446 U.S. at 71.

Left open by the *Bolden* plurality opinion, however, was the degree to which the *Zimmer* factors, derived from *White* v. *Regester*, might sufficiently underpin an inference of discriminatory purpose in a challenge to the *maintenance* (as opposed to the enactment) of an electoral system that dilutes minority votes. In this brief, *Amicus* will argue that in the absence of "smoking gun" evidence of purpose, the *Zimmer* factors, standing alone, are sufficient to underpin an inference of discriminatory purpose in a challenge to the maintenance of an at-large electoral scheme that effectively dilutes the voting power of minority groups. The factors outlined in the *Zimmer* case are consistent with proof of discriminatory purpose as

elucidated in *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Development Corp.*, 429 U.S. 252 (1977); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977) and *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), as well as with *Whitcomb* and *White*. The *Zimmer* factors also provide the most cogent, administrable standard of proof to address these issues. A finding of unconstitutional vote dilution based on inference of purpose from the *Zimmer* factors will represent a single, administrable intervention by the federal judiciary to secure constitutionally mandated minority access to the political process. Once this political access is secured, minorities can then utilize the political process to insure the viability of other constitutional protections.

ARGUMENT

I. The Fifth Circuit Correctly Read *Bolden* As Holding That The Zimmer Criteria Is Still Sufficient To Establish An Inference Of Purposeful Discrimination In The Retention Of The Burke County At-Large Voting System.

The various opinions of this Court in the *Bolden* case, and in some of the cases which preceded *Bolden*, indicate that for some time this Court has been grappling with the question of what constitutes sufficient proof to sustain an equal protection * challenge to an at-large electoral

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* Whether such a challenge relies on the Fourteenth or Fifteenth Amendment is irrelevant under this Court's interpretation of those amendments. The Court of Appeals did not distinguish the two constitutional grounds in its holding. See also, *Bolden*, 446 U.S. at 94-103 (White, J. dissenting). Appellants' have presented to the Court the question of whether the Fifteenth Amendment reaches vote dilution at all. Jurisdictional Statement

[Footnote continued on following page]

scheme which dilutes the votes of minority groups. Part A of the plurality opinion can be fairly read to establish that proof of discriminatory purpose is necessary to make out a vote dilution claim. However, the Court nonetheless recognized that disproportionate impact and discriminatory effect properly inform the inquiry into discriminatory purpose. 446 U.S. at 73. While Part B of the plurality opinion is primarily concerned with the drawbacks of a holding that would in essence protect a minority against electoral defeat, the plurality also distinguishes a holding of that character from a case where minorities were in fact denied equal access to the electoral process. 446 U.S.

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at iii., Brief for Appellants at ii. Given this Court's application of the Equal Protection Clause to vote dilution, it would seem unnecessary for this Court to reach the issue of the scope of the Fifteenth Amendment. *Amicus* wishes to note, however, that appellants suggested limitation of the Amendment is entirely unfounded. Appellants refer to the issue only in passing, Brief for Appellants at 27, relying on dicta offered without discussion or authority by a panel of the Fifth Circuit. *McMillan* v. *Escambia County*, 638 F.2d 1239, 1243 n. 9 (5th Cir. 1981).

Appellants would perpetuate the misunderstanding of the *Escambia* panel that the issue was left undecided in *Bolden*. In *Bolden*, itself a vote dilution case, four Justices found that the system challenged violated the Fifteenth Amendment. Opinions of Justices Blackmun, White, Marshall and Brennan. A fifth Justice, Justice Stevens, explicitly stated his belief that the Amendment reaches vote dilution. 446 U.S. at 84 and n. 3. Moreover, Justice Stewart's apparent intimation that the Fifteenth Amendment permits vote dilution came only as an oblique reference in the context of his discussion of the Fifteenth Amendment intent requirement. None of the cases cited in that section of the plurality's opinion lend any support to their restrictive reading of the Amendment. Appellants' reading of the Fifteenth Amendment would reduce the words of the Fifteenth Amendment to "language illusory in symbol and hollow in substance." *Id.* at 129 (Marshall, J. dissenting). Those like appellants who would deny an effective voice to minorities could then simply resort to indirect means with the confidence that the Fifteenth Amendment would provide no obstacle to their discrmination. See, generally, Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973).

at 77. The issue in *Bolden*, as in school desegregation cases such as *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979), and *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1977), is what would be a manageable standard to assess the constitutionality of such electoral systems given the occasional blurring of the purpose-effect distinction. The Fifth Circuit read the *Bolden* opinion in the context of the full range of previous decisions of this Court that served as guideposts for assessing proof in this area, and reached the conclusion that the *Bolden* decision did not extinguish the *Zimmer* analysis. *Amicus* is convinced that the Fifth Circuit decision was correct.

A close reading of the plurality *opinion* in *Bolden* suggests that the plurality did not reject the *Zimmer* factors. Rather, the factual circumstances of *Bolden* were not sufficient to meet the *Zimmer* criteria for ascertaining discriminatory purpose. The plurality found that any inference of discriminatory purpose deriving from the fact that no Black citizen had been elected to the Mobile City Commission was contradicted by the finding that Blacks were able to participate in the electoral process without hindrance. 446 U.S. at 73. The inference of discriminatory purpose deriving from the history of past discrimination suffered by Blacks was negated because, apparently, that discrimination was "distant" and did not have present effects touching the ability of Blacks to participate in the voting process. 446 U.S. at 74. Similarly, the plurality found that any inference of discriminatory purpose arising from discrimination in the dispensing of public services was only tenuous evidence as to the purpose behind the existence (as opposed to the maintenance) of the at-large electoral scheme under challenge. 446 U.S. at 74. Finally, in those circumstances, there was little inference of purpose that could be enhanced by application of the *Zimmer* enhancing factors. 446 U.S. at 74. The facts of *this* case as found

by the trial court, the Court of Appeals, and as presented in the Brief of Appellees, mandate that this Court affirm the decision of the Fifth Circuit and hold that the Burke County at-large electoral system violates the Fourteenth and Fifteenth Amendments.*

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* Although not addressed by the trial court, appellee Lodge added in his Amended Complaint a claim that the at-large electoral system in Burke County was in violation of the Thirteenth Amendment. Amended Complaint No. 2, ¶ 21, in the Joint Appendix of the parties at p. 13. The Court of Appeals also did not address the claim, although it concluded that the severe oppression of Blacks in Burke County "is directly traceable to their historical position as slaves." 639 F.2d 1358, 1381, n. 46.

One aspect of this case which has full agreement of all the parties is that the at-large system presently under challenge was instituted in 1911, a time when Blacks were still not allowed to vote in Burke County notwithstanding the passage 40 years previously of the Thirteenth, Fourteenth and Fifteenth Amendments. Those Amendments, especially the Thirteenth, were specifically designed to accomplish "the political and social elevation of Negroes to all the rights of white men." Congressional Globe, 38th Congress, 1st Session at 2987 (1864), and were in full effect when the statute authorizing at-large elections in Burke County was passed. *Amicus* deems it highly likely that were Burke County Blacks fully enfranchised in 1911, as the framers of the Reconstruction Amendments intended, the at-large election authorizing statute would never have been passed. Implementation of the at-large voting scheme was therefore necessarily based on the fact that the voting population was composed entirely of a homogeneous group of white males, and that, consequently, there were no minority votes to be diluted. The statute thus stands as a relic of the institution of slavery in that during slavery the vote was limited to a tiny privileged portion of the population.

This Court has held that the Thirteenth Amendment prohibits the institution of slavery and all the badges and incidents thereof. Civil Rights Cases, 109 U.S. 3, 20 (1883); *Jones* v. *Alfred H. Mayer*, 392 U.S. 409 (1968). An at-large electoral scheme which, upon enactment, was premised upon, and implemented despite the fact that a large section of the population was unlawfully disenfranchised should not be allowed to pass constitutional muster today, especially when it continues to have a discriminatory effect upon those same groups that were unlawfully excluded from participation when the at-large system was instituted. The at-large system of Burke County thus violates the Thirteenth, as well as the Fourteenth and Fifteenth Amendments.

Washington v. *Davis*, 426 U.S. 229 (1979) made clear that the invidious quality of a law or action claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. At 241. A discriminatory purpose need not be expressed on the face of a challenged statute or decision, *Id.* at 241. Indeed, disproportionate impact, *i.e.*, the fact that a law or action bears more heavily on one group than another, is relevant to the inquiry into purpose, especially as a starting point. *Id.* at 242, *Arlington Heights*, 429 U.S. at 266; *Feeney*, 442 U.S. at 274. In some cases an action is unexplainable on grounds other than discrimination. In most cases, however, discriminatory purpose must be inferred from the totality of relevant facts, including the fact of disproportionate impact, *Washington* v. *Davis*, 426 U.S. at 242. Inferring such purpose demands a sensitive inquiry into whatever circumstantial and direct evidence is available, *Arlington Heights*, 429 U.S. at 266. *Arlington Heights* provides a suggestive, but not exhaustive, list of types of circumstantial and direct evidence that might underpin an inference of discriminatory purpose. Such evidence includes:

> [1] the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes . . .
>
> [2] the specific sequence of events leading up to the challenged decision . . .
>
> [3] departures from the normal procedural sequence . . .
>
> [4] substantive departures . . . particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached.
>
> [5] The legislative or administrative history . . .

429 U.S. at 267-268.

Given a sensitive inquiry focusing on such circumstantial and direct evidence, there is no need to prove, nor in most cases would it be feasible to prove, that the challenged decision was motivated *solely* by discriminatory purpose, 429 U.S. at 265. Rather, the dispositive question is whether the plaintiff can show only that the challenged action rested "in part", *Id.* at 270 n.21, or "in some measure", *Feeney*, 442 at 276, on a discriminatory purpose, or that the discriminatory purpose was a "motivating" factor in the challenged action, *Mt. Healthy* at 287. Once a *prima facie* case is made, the burden shifts to the defendant, *Washington* v. *Davis* at 241, to establish "by a preponderance of the evidence," *Mt. Healthy*, 429 U.S. at 287, "that the same decision would have resulted even had the impermissable purpose not been considered," *Arlington Heights* at 429 U.S. 270 n.21. If the defendant fails to sustain this burden, the inference of discriminatory purpose "ripen[s] into proof," *Feeney*, 442 U.S. at 279 n.25, and the challenged action, decision or statute must be struck down.

The five types of circumstantial and direct evidence described above and by the court in *Arlington Heights*, 429 U.S. at 267-268, are particularly appropriate for inferring discriminatory purpose in the enactment of a law or in the making of a decision. It is, of course, in enactment or explicit decision-making that legislative or administrative history and departures from sequence, procedure or substance can most clearly underpin an inference of illegitimate purpose. The five types of evidence implicitly apply a common sense logic to ferret out purpose in enactment or decision-making. Departures from settled expectation (of sequence, procedure and substance), especially when combined with invidious historical biases (found in the historical background and legislative or administrative history) normally trigger a suspicion of improper motive. At that point, as this Court acknowledged in *Arlington Heights*, *Mt. Healthy*, and *Feeney*, the

burden should shift to the enacters or decision-makers to allow them to explain away the departures and biases, if they can.

The five types of evidence are, however, less helpful where the task is to infer purpose in the *maintenance* of a system which has a disproportionate impact on minorities, like at-large dilution of minority voting. Since, absent challenge, an electoral system will continue as is indefinitely, those in charge of the system normally need to take no action to maintain it. Maintenance occurs without the enactment or decision necessary to focus the inquiry into evidence of purpose mandated by *Arlington Heights*. In this context especially, "It is unrealistic . . . to require the victims of alleged discrimination to uncover the actual subjectve intent of the decision-maker . . ." *Washington* v. *Davis*, 446 U.S. at 253 (Stevens, J., concurring). Nevertheless, we can discover analogies to the types of evidence described in *Arlington Heights* that can focus the inquiry into evidence of purpose in the case of maintenance of a system which has a disproportionate impact on minorities. As in *Arlington Heights*, we should be guided by departures from settled expectation and by invidious historical biases.

It is, of course, precisely these types of evidentiary factors that this Court focused upon in *White* and *Whitcomb*, for the roughly analogous situation of purposeful dilution of minority voting through maintenance of an at-large voting system. In those cases, the Court directed its attention particularly to minority participation in and access to the political processes, and on election and nomination of representatives, *White* v. *Regester*, 412 U.S. at 766. Our normal expectation is that such participation and access will be open to all citizens and that "even improvident decisions will eventually be recitified by the democratic process." *Feeney*, 442 U.S. at 272.

Where evidence is offered that indicates a drastic departure from this expectation, especially when combined with a history of discrimination which has produced lingering effects which cut against this expectation, an inference of purposeful discriminatory maintenance may properly be made. Indeed, the Court has sanctioned such inferences in the Northern school desegregation context. See, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979), and *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979).

The types of factors distilled from *White* and *Whitcomb* by the Fifth Circuit in *Zimmer* are perhaps the only kind of evidence (absent a "smoking gun") that properly permit an inference of purposefully discriminatory maintenance in line with this Court's past elucidation of proof of discriminatory purpose. *Zimmer* set out four primary factors and a number of enhancing factors. The "primary" factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the "particularized interests" of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The "enhancing" factors include: the size of the district; the portion of the vote necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must vote; and whether candidates must reside in subdistricts.*

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* The inference of discriminatory purpose from the totality of circumstances could, in some cases, be strengthened by evidence of *disproportionately* depressed socio-economic conditions of the minority in question. For instance, the Fifth Circuit held that extensive past discrimination by Burke County officials inhibited the ability of Blacks to participate in the Burke County electoral process. 639 F.2d at 1378, 1379. Such a finding was, of course, an important part of the analysis advanced by this Court in *White* v. *Regester*, 412 U.S. at 766-770.

First, consider proof of a history of official racial discrimination directly touching the ability of minorities to register and vote and to participate in the democratic process. *Zimmer*, 485 F.2d at 1305; *White* v. *Regester*, 412 U.S. at 766. Past discrimination with present effects going to the heart of a group's ability to participate in the processes of democracy is a key factor in the ascertaining of discriminatory purpose. While it is true that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," 446 U.S. at 74, suspicion should be aroused and may properly lead to an inference of discriminatory purpose where there has been no effort by those in power to remedy the present effects of past discrimination. In those circumstances, our expectation that the democratic process will rectify improvident past decisions is clearly violated. Similarly, direct evidence of the exclusion of minorities from participation in the white-controlled electoral processes, *Zimmer*, 485 F.2d at 1305; *White*, 412 U.S. at 766-767, supports an inference of discriminatory purpose because we would expect minority participation, absent a wilful effort to exclude, or absent evidence showing that minorities were simply not interested in participating. In like manner, evidence of purposeful discrimination in the provision of public services from education to road paving, which are additional important components, of the measure of *responsiveness* to minority needs, *Zimmer*, 485 F.2d at 1305; *White*, 412 U.S. at 767, supports an inference of discriminatory purpose in maintaining the system by which discriminating representatives are elected. This is because discrimination in the provision of such services is an extraordinarily effective means of hindering minority participation in local political processes. Absent contrary evidence of purpose, proof of such discrimination that goes so directly to the ability of minorities to participate violates our expectation that the electoral processes as constituted are being maintained for proper purposes. In turn, evidence that the state

policy behind the electoral system is not, even if neutral in origin, divorced from the maintenance of racial discrimination, *Zimmer*, 485 F.2d at 1305, permits an inference that maintenance is for discriminatory purposes. This is especially proper in the case at bar, where maintenance is a function of local desire to minimize minority participation. Here, the failure to act to change an electoral system not rooted in a strong non-discriminatory state policy permits an inference of purposeful maintenance since control of the electoral system is the means of minimizing minority participation. Finally, of course, the enhancing factors may buttress the primary evidence of purpose, *Zimmer*, 485 F.2d at 1305; *White*, 412 U.S. at 766-767.

In sum, the *Zimmer* test requires the same analysis for a case challenging the *maintenance* of a discriminatory electoral system as the *Arlington Heights* criteria require for a case challenging a discriminatory enactment. Proof of the *Zimmer* factors, after a sensitive inquiry into such direct and circumstantial evidence of intent as exists, permits the trial court to perform its traditional function and properly to infer purpose based on the evidence before it. Proof of the *Zimmer* factors does not *require* a finding of discriminatory purpose; but their proof after an "intensely local appraisal", *White*, 412 U.S. at 769-770, of the evidence does permit an inference of purpose to be drawn and thereby, the *prima facie* case to be proved. Where the defendants have failed to produce substantial contrary evidence of purpose, the inference would ripen into proof.

Allowing a permissible inference of purpose from proof of the *Zimmer* factors—in itself an extremely difficult burden for a plaintiff—will assist the trial court to reach the correct result because the inference shifts the burden to defendants. As in other contexts, defendants in maintenance-voting dilution cases are obviously

the best source of proof of purpose, for they know their own motivations and have easiest access to information concerning maintenance of the system by which they were elected. See, generally, *Keyes* v. *School District No. 1*, 413 U.S. 205, 209 (1973); J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials of Common Law*, §§ 2486-91 (3d ed. 1940); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1207, 1255 (1970).

In essence, inference from proof of *Zimmer*-like criteria is consistent with past decisions of this court elucidating the inquiry into discriminatory purpose. Moreover, proof of such criteria is the only reasonable burden that can be placed on plaintiffs without forcing them to undertake the type of extreme motivational inquiry this court has labeled wholly improper in other settings. *See, Palmer* v. *Thompson*, 403 U.S. 217 (1971); *United States* v. *O'Brien*, 391 U.S. 367 (1968).

II. Purposeful, Systematic Exclusion Of Minority Citizens From Participation In The Process Of Local Governance Requires A Remedial Invalidation Of The Unconstitutional Electoral System Which Sustains The Ability To Exclude.

As this Court recognized in *Bolden*, *White* and *Whitcomb*, the crucial component in maintaining a discriminatory at-large electoral system is local white control over minority electoral access and opportunity to participate, with a purpose to keep minority citizens from ever being able effectively to articulate a demand for change of the electoral system. The *Zimmer* factors are a direct measure of the degree of purposeful, systematic exclusion of minority citizens from participation in the processes of democratic governance. If there is a purpose to exclude Black citizens from participation and thereby maintain

white supremacy in power, the simple means are implementation and maintenance of an electoral system that delivers the power to exclude Black citizens from the system.

One inescapable conclusion from the record of the case at bar is that Black citizens of Burke County have been intentionally submerged within an electoral system whose representatives purposefully fail—indeed refuse—to represent them. Appellants have managed to achieve an end virtually identical to that achieved by the "uncouth" line-drawing described in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), through wilful acts only slightly more subtle than in *Gomillion*. Black citizen voice in the political process has been effectively stilled and is as effectively ignored as if it were zoned out of Burke County.

From the vantage-point of submergence in an electoral system whose representatives purposefully fail to represent, a challenge to the electoral system is especially appropriate. Where the evidence in a given case makes out such submergence, as it apparently did not in the plurality's opinion in *Bolden*, there is a direct line from the wilful failure to represent, to maintenance of the electoral system that enables continued discrimination.*

Short of separately litigated challenges to each instance of purposeful discrimination that cumulatively makes out minority submergence and wilful failure to represent, a challenge to the electoral system is perhaps the only plausible way of enabling their reemergence into

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* Such submergence establishes the link between "evidence of discrimination," and "evidence of the constitutional invalidity of the electoral system" which concerned the plurality in *Bolden*, 446 U.S. at 74.

the mainstream processes of governance.* Separately litigated challenges, over education, housing, municipal jobs, disbursement of public services and benefits, brought on behalf of the same minority plaintiff class would present a remedial administrative nightmare for the federal court in question and would be an impossible burden for the plaintiffs to bear. It may well be true that once each separate purposeful barrier to the ability of Blacks in Burke County to participate is removed their participation would finally occur. However, it is equally true that once the purposeful means of perpetuating those separate barriers, i.e., the vote diluting electoral system, is changed to permit access, then the elected officials of Burke County can begin to move to dismantle the barriers and the effects of past discrimination. Judicial invalidation of the unconstitutional electoral system limits the federal judicial involvement to a single, remedial, administrable, intervention to secure constitutionally mandated access. It is far preferable to involving the judiciary in the day-to-day decision-making of local government. While this Court's decision to sustain the lower verdict in the case at bar would not immediately reverse

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* It is in this context that the issue of responsiveness to minority needs and concerns should be understood. If by proof of unresponsiveness the Circuit Court below meant to get at the qualitative issue of minority submergence, then such proof is a proper element of plaintiffs' *prima facie* case. If instead, the Court below meant to suggest a quantitative evaluation, e.g., counting up the number of unresponsive governing actions in each area of minority need, then proof of such unresponsiveness should not be given controlling significance. If such a quantititive evaluation were controlling, then local officials who were purposefully maintaining an at-large electoral system in order to dilute minority votes could defeat the constitutional challenge simply by satisfying some minimal number of essential minority needs. In any case, the lower court conclusion of unconstitutional voting dilution is not changed even if proof of unresponsiveness is not given controlling significance. It is therefore difficult to see why appellants raise this issue before the Court.

the effects of unconstitutional vote dilution in Burke County, it would properly enable the gradual process of regaining Black citizen voice in Burke County's political process.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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* Counsel for *Amicus* wish to express their appreciation to Michael Borrus and Steve Levitas, third year students at Harvard Law School, and Jane Ransom, legal worker at the Center for Constitutional Rights. Without their dedicated assistance, this brief could not have been written.

APPENDIX

Letterhead of

HEARD, LEVERETT & ADAMS, P.C.

December 11, 1981

Please reply: Elberton

Mr. Frank E. Deale, Staff Attorney
Center for Constitutional Rights
853 Broadway
14th Floor
New York, N.Y. 10003

Re: *Rogers* v. *Lodge, No. 80-2100*

Dear Mr. Deale:

I have conferred with my clients and we have concluded that we will not grant permission for the filing of amicus briefs in this case.

Your truly,

/s/ E. FREEMAN LEVERETT

.....

E. FREEMAN LEVERETT

EFL:er

cc: Mr. John R. Myer

Letterhead of

MESSERMAN & MESSERMAN CO., L.P.A.

December 11, 1981

Mr. Frank Deale
Center for Constitutional Rights
Fourteenth Floor
853 Broadway
New York, New York 10003

Re: *Rogers* v. *Lodge*
U.S. Supreme Court No. 80-2100

Dear Mr. Deale:

This is to confirm my consent to your filing an Amicus Brief in the above case.

Very truly yours,

/s/ DAVID F. WALBERT

.....

DAVID F. WALBERT

DFW:mk

MOTION FILED
DEC 18 1981

No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS, GEORGIA COALITION OF BLACK WOMEN, INC., LEAGUE OF WOMEN VOTERS OF GEORGIA, INC., MARTIN LUTHER KING, JR. CENTER FOR NONVIOLENT SOCIAL CHANGE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BAR ASSOCIATION, SOUTHERN REGIONAL COUNCIL, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, AND VOTER EDUCATION PROJECT, INC.

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Come now the above listed organizations, by counsel, and move the Court for leave to file a brief *amici curiae*, in support of the Appellees in the above-styled cause.[1]

[1] Counsel for the Appellants has not given consent to the filing of this brief.

The Georgia Association of Black Elected Officials is an organization of over 500 black elected officials in the State of Georgia. It is deeply concerned with the continuing use in the State of election procedures which perpetuate the effects of past discrimination in voting. It is acutely aware of the special barriers facing the minority community in electing candidates of its choice to office, and promotes the equal access of all citizens to full political participation.

The Georgia Coalition of Black Women, Inc., is an organization representing the interests of black women in 69 counties in Georgia. It believes that the fundamentals of democratic government can be realized only if all members of society participate in the electorate without distinction based upon sex, race, or ethnic origin. It advocates the disestablishment of structural barriers which impede such participation.

The League of Women Voters of Georgia, Inc. is a statewide, non-profit, non-partisan organization of over 2,000 members throughout the State of Georgia dedicated to informing and educating voters and protecting citizens' rights. It believes in an open governmental system that is representative, accountable and responsive to all citizens and that protects individual liberties established under the Constitution. In recent months its activities have included closely monitoring the redistricting process in Georgia and working for the extension of the Voting Rights Act. It views its interest in this case as an extension of its action to protect voting rights.

The Martin Luther King, Jr. Center for Nonviolent Social Change in Atlanta, Georgia was founded upon

the teachings and example of the late Martin Luther King, Jr. One of its goals is promoting social change through peaceful, non-violent means. This goal can be significantly enhanced through establishment of election practices which permit and encourage full and free participation by all citizens regardless of race.

The National Association for the Advancement of Colored People is a membership organization with more than 12,500 members in Georgia, one-half million members nationwide and branches and affiliates in all 50 states. The N.A.A.C.P. was founded in 1909 to confront and eradicate racial discrimination in all its forms. Over the years it has expended a great deal of its resources, and filed numerous law suits, in attempting to secure the right to vote for minorities and to have their votes exercised in a meaningful fashion. N.A.A.C.P. members in all 50 states have a vital interest in this case, and therefore the N.A.A.C.P.'s own vital interests are directly involved.

The National Bar Association is a membership organization composed of members of the bars of the various states, including the bar of Georgia. It advocates racial justice and fairness in the bar, the judicial system and in all institutions of American government. It believes that §2 is an important safeguard against discrimination in the electorate and should be construed in this case broadly and consistently with legislative policy.

The Southern Regional Council is the South's oldest biracial organization that has worked for equal opportunity among all peoples of the region through research, technical assistance, education, and advocacy.

Since its beginnings in 1944, the Council has had a consistent and primary concern for the right to vote of all citizens in the region. The organization's first major report concerned remaining legal barriers to the right to vote after the Supreme Court's decision in *Smith v. Allright*. In the 1960's, the Council created the Voter Education Project as a means to carry out its work in the field of voting and continues to operate several projects carrying out research and technical assistance relating to the voting rights of all Southerners.

The Southwest Voter Registration Education Project is a non-partisan, privately funded, tax exempt organization created in 1975 for the purpose of increasing voter registration of Spanish origin and Indian American citizens. It has conducted over 400 voter registration drives in Texas, California, Arizona, New Mexico, Colorado, Utah and Oklahoma. S.V.R.E.P. also litigates cases involving the elective franchise under the Fourteenth and Fifteenth Amendments, and particularly the Voting Rights Act of 1965. This case may have ramifications for other litigation involving the use of at-large elections to dilute the voting strength of Spanish origin and Indian Americans. Traditionally, at-large elections have had an adverse effect on the registration and participation rates of minorities in the Southwest. For these reasons, S.V.R.E.P. has a special interest in the outcome of this case.

The Voter Education Projects, Inc. in Atlanta, Georgia, is a publicly supported, non-profit, tax exempt organization. Its main goal is to foster minority political participation at all levels in order to build a more democratic and representative system of government. It has been the leading organization working full time

in the South to implement the Voting Rights Act through programs of voter registration and citizenship education. Since 1965, it has directed financial assistance to over 1,700 local southern organizations engaged in non-partisan voter registration and citizenship education activities. It is vitally concerned with the outcome of this case because of its impact upon minority political participation.

The case *sub judice* may have ramifications for other litigation in jurisdictions where the local governing body utilizes at-large elections, numbered posts, or majority vote requirements, and particularly in jurisdictions not covered by §5 of the Voting Rights Act of 1965 which may adopt such procedures in the future. Counsel for the parties herein may not focus on such issues because they do not directly affect them.

Because of the concerns of *amici* over equality in voting, and because counsel for the parties may not focus on the issues mentioned above, *amici* seek leave to file this Brief of *Amici Curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE	i
TABLE OF AUTHORITIES	viii
INTEREST OF THE AMICI	2
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, Prohibits the Use of At-Large Elections, Numbered Posts and a Majority Vote Requirement in Burke County, Georgia, Because of Their Discriminatory Effect	3
A. This Case Should Be Decided on Statutory Grounds If Possible	3
B. No Majority of This Court Has Ever Decided the Scope of §2	4
C. Congress Has Power to Go Beyond the Prohibitions of the Constitution to Remedy Discrimination in Voting	6
D. Congress Intended for §2 to Embody a Purpose or Effect Standard	7
(1) The Legislative History of §2 Shows the Intent of Congress to Proscribe Election Procedures Which Continue to Have Discriminatory Effects	9
(2) The Language of the Act Illuminates the Intent of Congress to Ban Voting Practices Based Upon Their Discrimina-	

tory Effect 19
(3) The Act as a Whole Shows the Intent of Congress to Impose a Uniform, Nationwide Standard 21
E. At-Large Elections, Numbered Post and Majority Vote Requirements in Burke County Have an Unlawful Effect in Violation of §2 26
CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. United States Dept. of Housing and Urban Dev., 441 U.S. 39 (1979) 20

Allen v. State Board of Elections, 393 U.S. 544 (1969) 5, 9, 10

Burns v. Richardson, 394 U.S. 73 (1966) 11

Cannon v. University of Chicago, 441 U.S. 677 (1979) 4

Chapman v. Meier, 420 U.S. 1 (1975) 11

City of Mobile v. Bolden, 446 U.S. 55 (1980) ... iv, 4

City of Rome v. United States, 446 U.S. 156 (1980) 6

Cort v. Ash, 422 U.S. 66 (1975) 4

Dallas County v. Reese, 421 U.S. 477 (1975) ... 11

Dothard v. Rawlinson, 433 U.S. 321 (1977) 7

Dougherty County Board of Education v. White, 439 U.S. 32 (1978) 20

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 7

Fortson v. Dorsey, 379 U.S. 433 (1965) 11

Fullilove v. Klutznick, 448 U.S. 448 (1980) 7

Gaston County v. United States, 395 U.S. 285 (1969) 8, 28

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 12

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 12

Keyes v. School District No. 1, 413 U.S. 189 (1973) 28

Lassiter v. Northampton County Board of Education, 360 U.S. 45 (1959) 7

Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981) 29

National League of Cities v. Usery, 426 U.S. 833 (1976) 7

Neil v. Biggers, 409 U.S. 188 (1972) 30

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 4

Oregon v. Mitchell, 400 U.S. 122 (1970) 7

Perkins v. Matthews, 400 U.S. 379 (1971) 10

Securities & Exchange Commission v. Joiner Leasing Corp., 320 U.S. 344 (1943) 20

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 21, 22

Spector Motor Services, Inc. v. McLaughlin, 323 U.S. 101 (1944) 3

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) 10, 13, 22

United States v. Uvalde Consolidated Independent School District, 625 F.2d 547 (5th Cir. 1980) 6

Washington v. Davis, 426 U.S. 229 (1976) 7

Whitcomb v. Chavis, 403 U.S. 124 (1971) 11

White v. Regester, 412 U.S. 755 (1973) 11

Wilkes County v. United States, 439 U.S. 999 (1978) 24

Wright v. Rockefeller, 376 U.S. 52 (1964) 12

Constitutional Provisions:

First Amendment ..... *passim*
Fifth Amendment ..... *passim*
Thirteenth Amendment ..... *passim*
Fourteenth Amendment ..... *passim*
Fifteenth Amendment ..... *passim*
Section 1, Fifteenth Amendment ..... *passim*
Section 2, Fifteenth Amendment ..... *passim*
42 U.S.C. §1971 ..... *passim*
42 U.S.C. §1973, Voting Rights Act of 1965 *passim*
42 U.S.C. §1973b(f) ..... *passim*
42 U.S.C. §1973j(d) ..... *passim*
Section 2, Voting Rights Act of 1965 ..... *passim*
Section 3, Voting Rights Act of 1965 ..... *passim*
Section 3(b), Voting Rights Act of 1965 *passim*
Section 3(c), Voting Rights Act of 1965 *passim*
Section 4, Voting Rights Act of 1965 ..... *passim*
Section 4(a), Voting Rights Act of 1965 *passim*
Section 4(d), Voting Rights Act of 1965 *passim*
Section 5, Voting Rights Act of 1965 ..... *passim*
Section 6, Voting Rights Act of 1965 ..... *passim*
Section 10(a), Voting Rights Act of 1965... *passim*
Section 13, Voting Rights Act of 1965 ..... *passim*

Public Works Employment Act of 1977 7

Other Authorities:

Congressional Record

111 Cong. Rec. 8295 8
111 Cong. Rec. 9795 8
111 Cong. Rec. 10453 11
111 Cong. Rec. 10456 11
111 Cong. Rec. 10861 25
111 Cong. Rec. 11078 25
111 Cong. Rec. 11401 8
111 Cong. Rec. 11467 8
111 Cong. Rec. 15647 8
111 Cong. Rec. 15725 8
111 Cong. Rec. 15991-92 8
111 Cong. Rec. 16314-16 8
115 Cong. Rec. 28535 14
116 Cong. Rec. 2753 14
116 Cong. Rec. 3714 15
116 Cong. Rec. 5523 15
116 Cong. Rec. 5527 15
116 Cong. Rec. 5679 15
121 Cong. Rec. H4734 (daily ed.) 5
121 Cong. Rec. 16255-260 16
121 Cong. Rec. 16773 16

141 Cong. Rec. 6984 18

141 Cong. Rec. 6985 ..... 17, 18

Congressional Hearings

Hearings on H.R. 6400 before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess. (1965) 11

Hearings on S.1564 before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess. (1965) 10

Proposed Amendments to the Voting Rights Act of 1965: Hearings on H.R. 4249 before the Judiciary Committee, 91st Cong., 1st and 2nd Sess. (1969-70) 13

Proposed Amendments to the Voting Rights Act of 1965: Senate Hearings S. 2507 before the Subcommittee on Constitutional Rights of the Judiciary Committee, 91st Cong., 1st and 2nd Sess. (1969-70) 13

Congressional Reports

House Rep. 439, 89th Cong., 1st Sess. (1965) 4, 8, 22

House Rep. No. 94-196, 94th Cong., 1st Sess. (1975) 6, 16, 21

House Rep. No. 97-227, 97th Cong., 1st Sess. (1981) 17

Senate Rep. No. 162, Part 3, 89th Cong., 1st Sess. (1965) 8

Senate Rep. No. 94-295, 94th Cong., 1st Sess. (1975) 5

Miscellaneous

Brief of the United States as *Amicus Curiae* filed in Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981) 18

No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS, GEORGIA COALITION OF BLACK WOMEN, INC., LEAGUE OF WOMEN VOTERS OF GEORGIA, INC., MARTIN LUTHER KING, JR. CENTER FOR NONVIOLENT SOCIAL CHANGE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BAR ASSOCIATION, SOUTHERN REGIONAL COUNCIL, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, AND VOTER EDUCATION PROJECT, INC.

INTERESTS OF AMICI CURIAE

The interests of *amici curiae* are set forth in the motion for leave to file this brief, *supra*, p. i.

SUMMARY OF ARGUMENT

This Court, pursuant to its own practice, is obligated to decide this case on statutory grounds if possible. The judgment below should be affirmed on the basis that the challenged voting procedures in Burke County, Georgia, have a discriminatory effect in violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973.

Congress clearly has the power to go beyond the commands of the Constitution in fashioning remedies for discrimination in voting. The scope of §2, however, has never been resolved by a majority of this Court.

The legislative history, the language of the statute and the entire structure of the Voting Rights Act show that Congress intended §2 at a minimum to reach voting practices which perpetuate the effects of past discrimination. Even were the language of §2 ambiguous, this Court is obligated to interpret the statute broadly and in a manner which best effectuates the underlying intent of Congress in enacting the Act.

The factual findings of the two courts below demonstrate that at-large elections, numbered posts and the majority vote requirement, perpetuate the effects of past discrimination in voting in Burke County. Unless this Court deems such findings to be clearly erroneous, it should affirm the judgment of the lower courts pursuant to 42 U.S.C. §1973.

ARGUMENT

I.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973, PROHIBITS THE USE OF AT-LARGE ELECTIONS, NUMBERED POSTS AND A MAJORITY VOTE REQUIREMENT IN BURKE COUNTY, GEORGIA, BECAUSE OF THEIR DISCRIMINATORY EFFECT.

A. This Case Should Be Decided on Statutory Grounds If Possible.

In cases such as this which present both constitutional and statutory issues,[1] the Court is obligated by its own practice "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The rule should be applied here where the record shows that at-large elections, numbered posts and a majority vote requirement for election of the Burke County, Georgia, Board of Commissioners have a racially discriminatory effect in violation of §2

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[1] The Appellees, plaintiffs below, relied upon the First, Thirteenth, Fourteenth and Fifteenth Amendments, as well as 42 U.S.C. §§1971 and 1973. Joint Appendix, 14. Section 1973 provides: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title."

of the Voting Rights Act of 1965, 42 U.S.C. §1973.[2] In any event, the Court should closely "consider whether the statutory grounds might be dispositive," and resolve the case on that basis, if possible. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

B. No Majority of This Court Has Ever Decided the Scope of §2.

No majority of this Court has ever decided whether §2 prohibits election practices which have a discriminatory effect in the absence of proof of invidious purpose. The plurality in *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), in concluding that discriminatory purpose was an essential element of a constitutional violation, rejected the plaintiffs' claim that §1973 contained a different standard of proof than the Constitution; but, no majority view was expressed.[3]

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[2] *Amici* believe the lower court was correct in finding purposeful discrimination in use of at-large elections in Burke County in violation of the Fourteenth and Fifteenth Amendments. However, for the reasons set out *infra*, it is unnecessary for this Court to reach the constitutional issues.

[3] The plurality assumed that a private right of action exists to enforce §2, *City of Mobile*, *supra*, 446 U.S. at 60, n. 8, citing Allen v. Board of Elections, 393 U.S. 544 (1969), which held that a private cause of action exists to enforce §5 of the Act. The availability of private relief under §2 is supported by other decisions of this Court on implied causes of action, Cannon v. University of Chicago, 441 U.S. 677 (1979), and Cort v. Ash, 422 U.S. 66 (1975), also cited in *City of Mobile*, *supra*, as well as the legislative history.

The House Report accompanying the 1965 bill described the purpose of §2 as "grant[ing] to all citizens of the United States a *right* to be free from [racially discriminatory voting practices]." House Rep. No. 439, 89th Cong., 1st Sess., (1965), U.S. Code

Justices White, Blackmun and Stevens did not discuss the statutory issue. Justices Marshall and Brennan expressed the view that vote dilution was prohibited irrespective of intent. *City of Mobile, supra*, 446 U.S. at 105 and n.2, 94. Thus, the opinions do not decide the question of proper application of §2 to this case.[4]

Cong. & Admin. News, 1965, 2437, 2454 (emphasis added). The Act expressly authorized the Attorney General to enforce §2. 42 U.S.C. §1973j(d). The Attorney General was the only person expressly authorized to enforce §5 as well, but the Supreme Court nevertheless held that a private cause of action based on §5 was inferred in the statute. *Allen v. State Board of Elections, supra*. By direct analogy, *Allen* had to mean there was a private cause of action under §2 also.

Congress removed all doubt in 1975, when it substituted "Attorney General or an aggrieved person" for "Attorney General" everywhere it appeared in §3, the so-called "pocket trigger" aimed at jurisdictions or "pockets of discrimination," not covered by §§4 and 5. House Rep. No. 439, *supra*, U.S. Code Cong. & Admin. News, 1965 2454. The Senate Report explained that this change was intended to create a dual enforcement mechanism, that is, "to afford to private parties the same remedies which Section 3 now affords only to the Attorney General." S. Rep. No. 94-295, 94th Cong., 1st Sess., 806 (1975). The proponents of this amendment made it clear that a private action was to be available under §2 for the purpose of providing the special §3 remedies. Congressman Drinan, for example, noted that private actions could be "based . . . upon statutes pursuant to [the Fourteenth and Fifteenth Amendments], such as 42 U.S.C. §§1971, 1973, 1983." 121 Cong. Rec. H4734 (daily ed., June 2, 1975).

[4] The plurality also held that vote dilution was prohibited by the Fourteenth, but not the Fifteenth, Amendment. *City of Mobile, supra*, 446 U.S. at 65. A majority of the Court, however, apparently believes that dilution claims may be predicated upon either provision. *Ibid.*, at 129 n.26 (dissenting opinion of Justice Marshall).

Amici contend that the legislative history, language and structure of the Voting Rights Act, including its extensions and amendments, all demonstrate that §2, like §5, contains an effect standard. As a consequence, at-large elections, numbered posts and the majority vote requirement in Burke County are unlawful without regard to whether they may have been adopted, or are being maintained, purposefully to discriminate against racial minorities.

C. Congress Has Power To Go Beyond the Prohibitions of the Constitution to Remedy Discrimination in Voting.

Congress has power to pass legislation that goes beyond the commands of the Fourteenth and Fifteenth Amendments and ban discrimination in voting that has a discriminatory effect. In *City of Rome v. United States*, 556 U.S. 156, 177 (1980), construing §5 of the Act, this Court held "that under §2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate §1 of the Amendment," and that §5's "ban on electoral changes that

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It is unnecessary to resolve the "ambiguity" of the plurality opinion over the reach of the Fifteenth Amendment and §2, see United States v. Uvalde Consolidated Independent School District, 625 F.2d 547, 552 (5th Cir. 1980), since Congress invoked its Fourteenth Amendment powers in amending and extending the Voting Rights Act in 1975. See 42 U.S.C. §1973b(f); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. (1975); S. Rep. No. 94-295, *supra*. Section 2, presently based upon both the Fourteenth and Fifteenth Amendments, clearly reaches claims of vote dilution.

are discriminatory in effect" was a proper exercise of congressional power.[8]

D. Congress Intended for §2 to Embody a Purpose or Effect Standard.

The proceedings in the House and Senate show that in enacting the Voting Rights Act of 1965, Congress was particularly concerned with eradicating the continuing effects of past discrimination in voting, and

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[8] Congress has statutorily proscribed conduct in a variety of other contexts that would not be unconstitutional absent proof of discriminatory purpose. Literacy tests have been eliminated by Congress, Oregon v. Mitchell, 400 U.S. 112 (1970), even though the identical tests may be entirely constitutional. Lassiter v. Northampton County Board of Education, 360 U.S. 45 (1959). Employees of local government must show "purposeful" discrimination to prevail in an employment discrimination case predicated on the Fifth or Fourteenth Amendments, Washington v. Davis, 426 U.S. 229 (1976), but no such showing must be made in a Title VII case against the same municipal or state defendant. Dothard v. Rawlinson, 433 U.S. 321 (1977). Congress can go so far as to enact legislation pursuant to the Fourteenth Amendment which eliminates protections otherwise afforded the states under the Tenth or Eleventh Amendments. *Compare* National League of Cities v. Usery, 426 U.S. 833 (1976), with Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). More recently, this Court approved the "minority business enterprise" provision of the Public Works Employment Act of 1977 after concluding that "[o]ur cases . . . confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination." Fullilove v. Klutznick, 448 U.S. 448, 477 (1980). Section 5 of the Voting Rights Act of 1965 is undoubtedly the premier example of an act of Congress pursuant to the Fourteenth and Fifteenth Amendments that exceeds the impact of those amendments alone.

not merely direct, purposeful discrimination by local jurisdictions. Senator Javits explained that the Act

> was designed not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination. . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs.[6]

More specifically, the concern of Congress over the continuing effects, or "wrongs," of past discrimination was the very basis for banning literacy tests and poll taxes.[7]

This Court has explicitly recognized the intent of Congress in the Act to ban election practices which have the effect of denying the right to vote. In *Gaston County v. United States*, 395 U.S. 285 (1969), the Court blocked the use of literacy tests in Gaston County, North Carolina, finding that it was "appropriate" in an action to enforce §4(a) of the Act "to consider whether a literacy or educational requirement has the 'effect of denying . . . the right to vote on account of race or color.'" *Ibid.*, 395 U.S. at 293. The Court relied solely upon the effect of the test, accepting as true — but regarding as irrelevant — the claims of the county that it had administered its election laws "in a fair and impartial manner." *Ibid.*, 395

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[6] 111 Cong. Rec. 8295.

[7] House Rep. No. 439, *supra*, 14-6, 21-2; Senate Report No. 162, Part 3, 89th Cong., 1st Sess., 15-6, 32-4 (1965); 111 Cong. Rec. 8295 (Sen. Javits), 9795, 11401, 11467 (Sen. Hart), 15647 (Rep. Cellar), 15725 (Rep. Burke), 15991-92 (Rep. Tunney), and 16214-16 (Rep. Roosevelt).

U.S. at 296. " 'Impartial' administration of the literacy test today would serve only to perpetuate these [educational] inequalities in a different form." *Ibid.* The literacy requirement was held to be unenforceable under §4(a).

In enacting §2, Congress similarly intended to render unlawful voting procedures other than literacy tests and poll taxes whose discriminatory effects are demonstrated.

(1) The Legislative History of §2 Shows the Intent of Congress to Proscribe Election Procedures Which Continue to Have Discriminatory Effects.

Attorney General Katzenbach testified before Congress during the hearings on the Voting Rights Act of 1965 and explained that §2 would ban "any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color." *See Allen v. State Board of Elections*, 393 U.S. 544, 566 n.31 (1969).

> Senator Fong. . . . Mr. Attorney General, turning to section 2 of the bill . . . there is no definition of the word "procedure" here. I am a little afraid that there may be certain practices that you may not be able to include in the word "procedure." For example, if there should be a certain statute in a State that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word "procedure." Could you?

> Attorney General Katzenbach. I would suppose that you could if it had that purpose. I had thought of the word "procedure" as including any kind of practice of that kind if *its purpose or effect* was to deny or abridge the right to vote on account of race or color.[8]

Admittedly, no single statement in an extensive legislative hearing can be deemed conclusive. *Allen v. State Board of Elections*, *supra*, 393 U.S. at 568-69. However, as this Court has pointed out, the Attorney General played an "extensive role" in drafting the Act and explaining its operation to Congress, *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 131 (1978), and because the Attorney General has broad enforcement responsibilities under the statute, his contemporaneous interpretation of the Act is "compelling" and "persuasive" and should be accorded "great deference." *Ibid.*, at 131-32; *Perkins v. Matthews*, 400 U.S. 379, 391 (1971).

It is clear from the legislative history as a whole, however, that the Attorney General's description of the scope of §2 was not off hand or ill considered. In response to questioning in both the House and the Senate on other sections of the Act, Attorney General Katzenbach consistently equated "effect" with the denial or abridgement of voting rights. *E.g.*,

> Mr. Katzenbach. . . . [a jurisdiction seeking preclearance] would have to establish . . . that those

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[8] Hearings on S. 1564 before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., 191 (1965) (emphasis added).

> qualifications and procedures would not have the effect of denying or abridging rights guaranteed by the 15th amendment.[9]

Similar statements are found throughout the hearings and debate in both houses equating discriminatory effect with a violation of voting rights.[10]

Not only was "effect" consistently identified with "denial or abridgement," but nowhere in the debates can any inference be drawn that either the proponents or opponents of §2 believed that it reached only purposeful discrimination.

Prior to passage of the Act, this Court had held that vote dilution could rest upon either purpose or effect. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) ("It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstance of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."). Subsequent cases reiterated this standard. *Burns v. Richardson*, 394 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); *White v. Regester*, 412 U.S. 755, 765-70 (1973); *Dallas County v. Reese*, 421 U.S. 477, 480 (1975); *Chapman v. Meier*, 420 U.S.

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[9] Hearings on H.R. 6400 before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess., 90 (1965).

[10] 111 Cong. Rec. 10453 (Sen. Prouty), 10456 (Sen. Hart). ("He [the Attorney General] takes action [to ban the poll tax] under any circumstances where it may have the effect of denying a person his constitutional rights in respect to the opportunity to vote.").

1, 17 (1975). *See also Gomillion v. Lightfoot*, 364 U.S. 339 (1960), involving discriminatory gerrymandering of city voting lines, in which the Court focused exclusively on actual effects eschewing any requirement of proof of intent.[11] Despite the fact that purpose may be required post-*City of Mobile* for a constitutional violation, Congress obviously understood, in light of the language in the decisions of this Court, that a denial or abridgement of voting rights could result from practices which had either a discriminatory purpose or effect.

The legislative histories of the re-enactments of the Voting Rights Act in 1970 and 1975, and the 1980 Report of the Committee on the Judiciary of the House on extension of the Act, further show that the original intent of Congress was to establish a purpose or effect standard for §2.[12]

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[11] Wright v. Rockefeller, 376 U.S. 52 (1964), is not to the contrary. There, the plaintiffs had alleged only that they were the victims of intentional discrimination in redistricting. The case was decided on the issue raised, but there is nothing in the opinion that suggests only purposeful discrimination was constitutionally cognizable.

[12] The views of members of a later Congress may not be dispositive of legislative intent, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977), but as Justice Marshall has pointed out, where legislative history is sparse the Court is obligated to " '[seize] everything from which aid can be derived . . .,' . . . to reconstruct Congressional intent," including subsequent Congressional legislation touching upon the same subject matter. *Ibid.*, at 394 (concurring in part and dissenting in part). The rule is surely applicable here where the subsequent interpretations of Congress in extending and expanding the Act have been consistent and applied over a significantly long period

In 1970, Attorney General Mitchell introduced a bill on behalf of the administration to repeal §§4 and 5 and substitute in their place a provision authorizing the Attorney General to bring suit against any jurisdiction in the nation which "has enacted or is seeking to administer any voting qualification or prerequisite to voting which has the purpose or effect of denying or abridging the right to vote on account of race or color."[13] According to Attorney General Mitchell:

> Under our proposal, he [the Attorney General] could institute a lawsuit any place in the country based on a broader statutory protection of a discriminatory "purpose or effect" of a particular voting law or set of voting laws.
>
> This would make it clear to the courts that it is unnecessary to prove that the intent of the local or state officials was racially motivated.
>
> For all of these additional safeguards, we have only modified one section of the Act. State and counties would no longer be required to automatically submit all changes in their voting laws.[14]

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of time. United States v. Board of Commissioners of Sheffield, Alabama, *supra*, 435 U.S. at 135.

[13] Proposed Amendments to the Voting Rights Act of 1965: Senate Hearings S. 2507 before the Subcommittee on Constitutional Rights of the Judiciary Committee, 91st Cong., 1st and 2nd Sess., 538 (1969-70), and Proposed Amendments to the Voting Rights Act of 1965: Hearings on H.R. 4249 before the Judiciary Committee, 91st Cong., 1st and 2nd Sess. 282 (1969-70).

[14] 1970 Senate Hearings, *supra*, 189-90.

Senator Mathias opposed the amendment in the Senate hearings in part because "the power being given to the Attorney General to seek injunctive relief doesn't add anything of great substance which isn't already in the act."[15]

Senator Bayh similarly opposed the Administration's proposed amendment because it repealed the pre-clearance provisions of the Act without adding in return anything of substance to existing law.

> Senator Bayh. Very frankly I do not think you are getting any additional power that you do not now have under the 1957 and 1964 acts and under sections 2, 3, and 12 of the 1965 Voting Rights Act. I think you have these very powers.[16]

That the amendment did not alter the existing substantive standard of §2 is apparent from the objections of both Senators Mathias and Bayh that the only consequence of the proposal would be to shift the burden of proof from jurisdictions seeking to make voting changes under §5, to minorities seeking to enforce §2.[17]

The Mitchell proposal was passed by the House,[18] but was defeated in the Senate. Senators Bayh, Burdeck, Cook, Dodd, Fong, Hart, Kennedy, Mathias, Scott and Tydings introduced a substitute (the Scott-Hart Amendment) for the Administration's bill,[19] ex-

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[15] *Ibid.*, 22.

[16] *Ibid.*

[17] *Ibid.*, 197: "Senator Bayh. . . . It [the Administration's proposal] requires proof of discrimination though, does it not?"

[18] H.R. 4249, 115 Cong. Rec. 28535 (1969).

[19] Amendment No. 519, 116 Cong. Rec. 2753 (1970).

plaining that the latter would both weaken the Voting Rights Act and add nothing at all to the existing powers of the Attorney General under §2.

> 5. *Attorney General's Power to Sue Adds Nothing of Substance.* — S. 2507, after eliminating the simple enforcement procedure described above, would substitute a section authorizing the Attorney General to sue in Federal Court whenever he believes a state has enacted or is administering any voting procedure with the purpose or effect of denying the franchise on grounds of race. But the Attorney General already has the authority to bring such suits [under §§2 and 12(d)]. . . . Thus, the new section would give the Attorney General no new powers in addition to those granted by the Voting Rights Act and its predecessors. . . . Most importantly, under the present law, lawsuits with or without direct appeal are unnecessary since Section 5 preserves the status quo until legality is decided without need to resort to litigation.[20]

Seven of the ten senators thus opposing the Administration's proposal had also been sponsors of S. 1564, the bill enacted as the Voting Rights Act of 1965.

The Scott-Hart Amendment was ultimately passed in modified form by both the House and Senate.[21] The language of §2, however, was left wholly intact.[22]

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[20] Joint Views of Ten Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5523, 5527 (1970).

[21] 116 Cong. Rec. 3714, 5679 (1970).

[22] Voting Rights Amendments of 1970, P.L. 91-285, 84 Stat. 314.

In 1975, the opponents of extension of the Act introduced an amendment altering the bail out formula of §§4 and 5.[23] They contended that the new provisions would give an incentive to local jurisdictions to disestablish election mechanisms as a condition for bail out which continued adversely to affect blacks, and enact in their place "apportionment plans which . . . avoid submergence of cognizable racial or minority groups." 121 Cong. Rec. 16255-260 (1975). Congressman Rodino, a sponsor of the bill to extend the Act, H.R. 6219, opposed the new bail out because it would merely "provide the States that are now covered with a reward for saying they will live up to in the future what we believed the law required them to live up to during these past 10 years." 121 Cong. Rec. 16773. The new bail out proposal was defeated, and the substantive standard in §2 continued.

The action of the House in 1981 in voting overwhelmingly to extend the Act confirms the original intent of Congress. In response to the plurality opinion in *City of Mobile, supra*, the House, by a vote of 389 to 24, passed an amendment to §2 "restoring" the original intent of Congress that the statute reached election practices which had a discriminatory effect or result.

Prior to *Bolden*, a violation of Section 2 could be established by direct or indirect evidence concerning the context, nature and result of the practice at issue. In *Bolden*, Justice Stewart writing for the plurality, construed Section 2 of the Act as merely restating that prohibitions of the Fifteenth Amend-

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[23] H.R. Rep. 94-196, 94th Cong., 1st Sess., 73-80 (1975).

ment. The Court held that a challenged practice would not be unlawful under that section unless motivated by discriminatory intent. The Committee does not agree with this construction of Section 2 and believes that the intent of the section should be clarified.

Section 2 of H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision.

* * * *

The purpose of the amendment to Section 2 is to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice.[24]

The debate on H.R. 3112 further shows that the House understood that it was merely restoring the original intent of Congress.

Mr. Edwards. . . . Section 2 was designed in 1965 by this Congress to stop the maintenance by state and local governments of laws that discriminate in voting or methods of election. It does apply nationwide so the Supreme Court in 1980 was interpreting an Act of Congress and interpreted in a way that we did not intend in 1965.[25]

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[24] House Rep. No. 97-227, 97th Cong., 1st Sess., 29 (1981) (footnotes omitted).

[25] 141 Cong. Rec. 6985.

> Mr. Sensenbrenner. . . . Congress intended that the same standard of proof apply throughout the act but that different remedies would apply depending upon when the violation occurred. . . . Congress did not intend that a proof of a violation of the act would differ from section to section.[26]
>
> * * * *
>
> Mr. Conyers. . . . So I encourage every member to read the report of the committee at page 29 where Attorney General Katzenbach clearly explained why specific intent was neither intended by the Congress or required to effectuate this section.[27]

This interpretation of §2 was not that of the Judiciary Committee or the House alone, but the Attorney General as well. In an *amicus* brief filed in this case in the court of appeals, the Attorney General concluded that §2 embodies a standard analogous to that in §5, and that minority plaintiffs are entitled to relief under §2 "if they . . . can establish that the challenged practices, though neutral in design, have the effect of abridging the right to vote on account of race." Brief for the United States as Amicus Curiae, 51.

Congressman Rodino commented upon the position taken by the Attorney General in the debate on the floor of the House.

> Mr. Rodino. . . I would merely like to point out that this is not just an interpretation on the part of the Judiciary Committee. The Justice Department

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[26] *Ibid.*, 6984.
[27] *Ibid.*, 6985.

took a position in the case of Lodge v. Buxton whereby it established what had originally been the intent of the Congress that where there was discriminatory effect then there was indeed a violation of section 2 of the Voting Rights Act.[28]

The legislative history of the 1965 Act, as well as the extensions of 1970 and 1975, and the proceedings in the House in 1981, all show that Congress intended to provide an effect standard in §2 in addition to banning election practices adopted or maintained for a discriminatory purpose.

(2) The Language of the Act Illuminates the Intent of Congress to Ban Voting Practices Based Upon Their Discriminatory Effect.

Section 2 prohibits the use of voting practices which "deny or abridge" the right to vote. Although the statute does not use the phrase "purpose or effect" in defining "deny or abridge," the express language of other sections of the Act demonstrates that Congress intended in §2 to describe — and prohibit — practices which had a racially discriminatory effect, as well as those which were enacted with an invidious purpose.

For example, in §3(b), setting out the standard to be used by courts in determining whether to suspend a test or device for voting, Congress defined a violation of the statute, *i.e.*, the denial or abridgement of the right to vote, as use of a test or device "for the purpose or with the effect" of discriminating. Other provisions

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[28] *Ibid.*, 6985.

of the Act, the "pocket trigger" in §3(c), §§4(a) and (d), providing for bail out by covered jurisdictions, §5, the pre-clearance requirement, §10(a), prohibiting use of the poll tax, and §202(a)(5), prohibiting durational residency requirements in presidential elections, similarly define practices which deny or abridge the right to vote as those which have a discriminatory purpose or effect.

The overall language of the Act thus discloses that when Congress used the phrase "deny or abridge" in §2, it meant to include practices which had either a discriminatory purpose or effect. Even if the language of §2 were ambiguous and subject to different interpretations, the Court would be obligated to adopt the meaning most consistent with underlying legislative policy. *Alexander v. United States Dept. of Housing and Urban Dev.*, 441 U.S. 39, 53 (1979); *Securities & Exchange Commission v. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("courts will construe the details of an act in conformity with the dominating general purpose, will read text in the light of context and interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.")

There can be no doubt of the underlying policy of the Voting Rights Act, nor of the requirement of this Court that its provisions be construed broadly. Because voting rights are the most important rights in a democracy, the Act should be given the "broadest possible scope" in order to achieve the goal of eliminating "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Dougherty County Board*

of Education v. White, 439 U.S. 32, 38 (1978), quoting from *South Carolina v. Katzenbach*, 383 U.S. 301, 565, 567 (1966).[29]

(3) The Act as a Whole Shows the Intent of Congress to Impose a Uniform, Nationwide Standard.

The Voting Rights Act of 1965 was a departure from prior legislative models, not because of its substantive provisions, but because of its procedure.

> First, Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. *South Carolina v. Katzenbach, supra*, 383 U.S. at 309.

Earlier laws enacted in 1957, 1960 and 1964, depended primarily on litigation for enforcement, with the burden of proof on minority plaintiffs. Unfortunately, the laws failed to insure equal voting rights.

In 1965, Congress adopted an entirely new approach, banning the practices used to exclude minorities from registration and requiring covered jurisdictions under §5 to demonstrate that any new election practices were

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[29] When Congress expanded coverage in 1975, it indicated that the Act should continue to receive the broadest construction. H.R. Rep. No. 94-196, *supra*.

not discriminatory before they could be implemented. *South Carolina v. Katzenbach*, *supra*, 383 U.S. at 315-16.[30]

Congress realized, however, that the coverage formula might be over inclusive and incorporated a provision, §4(a), allowing jurisdictions to "bail out" from §5. Congress was equally aware that not all jurisdictions in which there was a significant probability of denial of equal voting rights would meet the trigger formula of §4. These jurisdictions, as well as discriminatory voting practices beyond the reach of §5, were to be amenable to suit on a case by case basis under §§2, 3, 6 and 13.[31] Given Congressional awareness of the possibility of error in the coverage formula of §4, it is inconceivable that it nonetheless intended for a different substantive standard to apply whether voting practices were measured by §2 or §5. Senator Dirksen, in fact, repeatedly stressed the need for a uniform, nationwide standard.

> Mr. Dirksen. . . .we had section 2 there, which is the foundation for my bill, namely the 15th amendment. That is applicable anywhere at any time, regardless of what the Census Director may find, or what you may determine. That is the broad function of this bill.[32]

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[30] Covered jurisdictions include those in which "there was a high probability of pervasive racial discrimination in voting" based upon use of a "test or device" and low levels of registration or voting. United States v. Board of Commissioners of Sheffield, Alabama, *supra*, 435 U.S. at 119.

[31] 1965 Senate Hearings, *supra*, 208; House Rep. No. 439, *supra*, 13, 23-4.

[32] 1965 Senate Hearings, *supra*, 171-72.

Senator Dirksen also made it clear that non-§5 jurisdictions could not escape the Act's permanent ban on discriminatory voting procedures.

> Senator Dirksen: May I add there, actually under the broad language of section 2, you do not eliminate Texas [a non-covered jurisdiction in 1965] from this bill. The question is whether under section 2, which is almost a rephrasing of the 15th amendment, you find discrimination, denial or an abridgement of the right to vote and—
>
> Attorney General Katzenbach: Yes.
>
> Mr. Dirksen (continuing): And it states specifically that if there are procedures or qualifications Texas does not escape. It is a question of whether you can establish it.[33]

The Voting Rights Act was intended to be a comprehensive measure, covering the entire nation and reaching every practice affecting voting. "Purpose or effect" language appears in each of the Act's provisions estab-

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[33] *Id.*, at 208. The plurality in *City of Mobile*, *supra*, 446 U.S. at 60-1, citing this exchange between Senator Dirksen and Attorney General Katzenbach, dismissed the §2 claim because in its judgment "this section simply restated the prohibitions already contained in the Fifteenth Amendment." It is immaterial that the Attorney General and Congress may have been wrong in believing that §2 and the other provisions of the Act had the same reach as the Fifteenth Amendment. What *is* relevant is that Congress intended to ban practices which have a discriminatory effect, regardless of their purpose, and that it had the power to do so. City of Rome v. United States, *supra*, 446 U.S. at 177. The scope of §2 is thus unrestricted by any subsequent limitations placed by this Court on the Constitution itself in *City of Mobile*.

lishing substantive standards for judicial or administrative enforcement, §§3, 4 and 5. Section 2 was intended as a broad, general guarantee of equal voting rights, and it is illogical to assume that Congress intended for it to afford a standard of protection less than that in the parts of the Act applicable only to covered jurisdictions. Indeed, the intent of Congress from the 1965 legislative history, the histories of the amendments of 1970 and 1975, the proceedings in the House in 1981, and the language and structure of the Act, was to provide the same level of protection in §2 as the other provisions of the Act.

To hold that §§2 and 5 contain different substantive standards would actually encourage jurisdictions to retain election practices which have discriminatory results, a policy patently inconsistent with Congressional policy in enacting the Act.[34] By the same token, it would be totally illogical and inconsistent with Congressional policy to hold that identical election practices in covered jurisdictions were valid under §2 but unenforceable under §5 depending solely on when they were enacted, *i.e.*, before or after November 1, 1964, the effective date for pre-clearance under §5.[35]

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[34] The authors of the 1975 bail out amendment, *see supra*, 16, argued that §2 indeed has such an effect, a position repudiated by the Congress as a whole.

[35] Such a crazy-quilt result would obtain under the analysis of the plurality in *City of Mobile*. Thus, Wilkes County just north of Burke would be banned under §5 from electing its commission at-large since its procedures were adopted in 1972, *see* Wilkes County v. United States, 439 U.S. 999 (1978), but Burke would be permitted to elect its commissioners at-large because its plan was adopted in 1911—at a time, moreover, when blacks were wholly excluded from deciding how the government was to be elected.

The fact that a non-objection under §5 does not bar a subsequent lawsuit under §2 is further evidence that Congress intended the latter statute to cover practices which yield a discriminatory result. Assuming that the Attorney General concludes a voting change has no discriminatory purpose or effect under §5, the main reason for authorizing a subsequent suit under §2 would be to ban use of changes which later produce discriminatory effects. Senator Eastland acknowledged as much when he suggesed there was no real way to escape the substantive standard of §5, even in cases where there was no objection from the Attorney General.

> Mr. Eastland. . . .There is an escape clause in this subsection, Mr. President; oh, yes: an escape clause to the effect that even if the Attorney General fails to object and the court finds that a proposed new State law with respect to voter qualifications, for instance, will not now have the effect of denying or abridging the right to vote on account of race or color, the Attorney General is still free to bring an action the next day, if he wishes, to enjoin the enforcement of the new statute.[36]

Congress could not rationally have intended anything less than that §2 contain the same substantive standard as the other provisions of the Act.

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[36] 111 Cong. Rec. 11078; *also see ibid.*, 10861 (Sen. Stennis).

E. At-Large Elections, Numbered Post and Majority Vote Requirements in Burke County Have an Unlawful Effect in Violation of §2.

A finding of unlawful effect from use of the three voting practices challenged in this case does not depend upon a mere showing of numerical under-representation of blacks in elected office, nor does it require application of impressionistic, judicially unmanageable standards. Unlawful effect flows from objective evidence of past intentional discrimination and its continuing impact upon the present ability of minorities effectively to participate in Burke County politics.[37]

The evidence of past discrimination and its present effects found by the trial court, and affirmed by the court of appeals, was overwhelming. Blacks in Georgia were traditionally "denied access to the election process by such devices as literacy tests, poll taxes, and white primaries." JSA, 86a.[38] "Before enactment of the 1965 Voting Rights Act, Black suffrage in Burke County was virtually non-existent." *Ibid.*, 71a. The increase in black registration after the Act "clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date." *Ibid.*, 72a. Moreover, "[t]he 1976 Georgia Constitution still demands a literacy and 'good character and understanding' test as a prequisite for voting, al-

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[37] It is thus unnecessary in resolving this appeal for the Court to decide whether adverse racial effect standing alone would ever violate §2.

[38] "JSA" refers to the Jurisdictional Statement Appendix.

though this provision is suspended by the 1965 Voting Rights Act." *Ibid.*, 86a n.23.

Further evidence "of present discrimination unfairly precluding Blacks from effective political participation [is] the requirement established by Ga. Code Ann. §34-605," requiring the chief registrar to be an owner of real property. *Ibid.*, 75a. The court found that "fewer Blacks than Whites are freeholders," and that "this is in part due to past discrimination, thus buttressing the Court's conclusion that Blacks are being unfairly precluded from participating in the political process." *Ibid.* The requirement that any candidate for the county commission also be a freeholder "has been continued in the law to this date." *Ibid.*, 65a n.2.

The county traditionally had only one registration site until "after a pre-trial conference before and 'friendly persuasion' by this Court." *Ibid.*, 81a. Still, "Blacks, by virtue of their relatively severe degree of poverty, the size of the county . . . and the absence of a public transportation system, are more likely than whites to have a problem physically getting to the polling places where they may exercise their most fundamental of rights." *Ibid.*, 86a.

"No Black has ever been elected to the County Commission, in spite of the fact that historically Burke County has more Blacks than Whites." *Ibid.*, 66a. A major reason blacks are unable to elect candidates of their choice to office is they have received "inferior formal education [which] has had and does now have a strong tendency to preclude Blacks' effective partici-

pation in the political process." *Ibid.*, 85a.[39] Members of the County Commission are elected by majority vote to numbered posts, and there is no residency requirement, election procedures which tend "to submerge the will of the minority and . . . enhance plaintiffs' lack of access to the system." *Ibid.*, 92a-3a. "[B]latant and pervasive denial of access" was also established by the "Commissioners' failure to appoint Blacks to the [local] committees and boards." *Ibid.*, 89a, 95a.

"Past discrimination has also chilled the opportunity for Blacks becoming involved in the Democratic Party Primary," which plays an important role in Burke County politics. *Ibid.*, 74a. The court found that "past discrimination has kept Blacks from becoming members of the Burke County Democratic Executive Committee. It was not until after this lawsuit was filed that the Executive Committee, which conducts the only party primary in the county, gained a black as one of its twenty-four members." *Ibid.*, 74a-5a.

There was "clear evidence" of racial bloc voting "ascribed in part to past discrimination." *Ibid.*, 72a.[40]

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[39] The relationship between past discrimination and present effects is unimpaired because the former may have been practiced by other officials or does not relate directly to voting. *See* Gaston County v. United States, *supra*, 395 U.S. at 290 (barring use of the literacy test in part because of prior discrimination in public education).

[40] It is not significant that bloc voting is the consequence of private choice. As this Court acknowledged in Keyes v. School District No. 1, 413 U.S. 189, 202 (1973), official discrimination has "a substantial reciprocal effect" on private choices. Nor is the relationship between past discrimination and present effects in this

Noting that there was still "virtual segregation of all social, religious, and business organizations," the court concluded that blacks were excluded "from the personal contact politics of Burke County." *Ibid.*, 89a. "[T]he result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county." *Ibid.*, 89a. As further evidence of the exclusionary effect of at-large voting, the court noted that the first black ever elected in the county seat of Waynesboro ran from "a district with a high percentage of black residents," created as a result of a federal court order. *Ibid.*, 73a.

The court of appeals affirmed the trial court, concluding that

> historical and present discrimination operated in conjunction with the officially sanctioned electoral system to unfairly limit the access of Blacks to the political process.
>
> * * * *
>
> The picture that plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. *Lodge v. Buxton*, 629 F.2d 1358, 1379, 1358 (5th Cir. 1981).

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case remote. Ninety-nine per cent of blacks and 76 per cent of whites in Burke County were born in Georgia. *Ibid.*, 83a n.18. Thus, the overwhelming majority of residents were subjected to—and continue to be affected by—the *de jure* and *de facto* discrimination found by the court to exist in Burke County.

CONCLUSION

Unless this Court deems the facts as found by the two courts below to be clearly erroneous, *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972), it must conclude that the three challenged practices have a discriminatory effect in Burke County. If *amici* are correct that such effect is proscribed by §2, at least where it perpetuates past intentional discrimination in voting, the judgment below should be affirmed.

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OCTOBER TERM, 1981

QUENTIN ROGERS, *et al.*,
Appellants,
v.
HERMAN LODGE, *et al.*

On Appeal from the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae*. The appellees have consented to the filing of this brief, but appellants have not.

The Lawyers' Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee; it has pro-

vided legal representation to litigants in numerous voting rights cases for the past fifteen years.*

This case presents important issues of proof and legal standards applicable to challenges to at-large elections for dilution of black voting strength. The case has importance beyond its immediate facts because the ruling of the Court will affect pending and future litigation in this area. The Lawyers' Committee represents black voter plaintiffs and is otherwise involved in four pending cases challenging at-large election schemes,** and the Court's ruling in this case is likely to have a direct impact on the outcome of those pending cases.

In our view, the judgment of the Court of Appeals should be affirmed, but we wish to present arguments different from those expressed by the Court of Appeals or likely to be forwarded by the parties. We take the position that the District Court's conclusion that at-large county commission elections are being maintained for an invidious purpose is amply supported by subsidiary find-

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* For example, the Lawyers' Committee represented a class of black citizens of Mississippi in reapportionment litigation which was before this Court on several occasions: *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); *Connor* v. *Coleman*, 440 U.S. 612 (1979); *id.*, 441 U.S. 792 (1979); *United States* v. *Mississippi*, 444 U.S. 1050 (1980). The Lawyers' Committee also has been granted leave of this Court to file briefs *amicus curiae* in a number of important voting rights cases decided by this Court, including *McDaniel* v. *Sanchez*, 68 L. Ed.2d 724 (1981); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Wise* v. *Lipscomb*, 437 U.S. 535 (1978); and *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976).

** *Kirksey* v. *City of Jackson*, 506 F. Supp. 491 (S.D. Miss. 1981), *aff'd*, —— F.2d —— (5th Cir., December 11, 1981); *Boykins* v. *City of Hattiesburg*, Civil No. H77-0065(C) (S.D. Miss., filed May 27, 1977); *Greenville Citizens for More Representative Government* v. *City of Greenville*, Civil No. GC-77-99-S (N.D. Miss., filed August 30, 1977); and *Jordan* v. *City of Greenwood*, Civil No. GC-77-52-K (N.D. Miss., filed May 6, 1977).

ings of fact and evidence which prior decisions of this Court have held are sufficient to support a conclusion of discriminatory purpose. We also argue that at-large elections in Burke County are unconstitutional because they perpetuate the present effect of a past purposeful and intentional denial to blacks of equal access to the political process, and that proof of the unresponsiveness of the white elected officials to black interests should not be a controlling element of proof of the unconstitutionality of the at-large election system under which the officials were elected.

Accordingly, the Lawyers' Committee seeks leave to file this brief to present questions of law and legal argument that are not likely to be presented by the parties and which, if accepted, would directly control this Court's disposition of this case.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves the Court for leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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INDEX

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE DISTRICT COURT'S CONCLUSION THAT AT-LARGE ELECTIONS HAVE BEEN MAINTAINED IN BURKE COUNTY FOR THE DISCRIMINATORY PURPOSE OF DENYING BLACKS EQUAL ACCESS TO THE POLITICAL PROCESS IS CORRECT AND SHOULD BE SUSTAINED	2
II. THE CONSTITUTION PROHIBITS AT-LARGE ELECTIONS WHICH HAVE THE EFFECT OF PERPETUATING OFFICIAL AND INTENTIONAL DENIAL TO BLACKS OF EQUAL ACCESS TO THE POLITICAL PROCESS	15
III. THE OPINION OF THE COURT OF APPEALS IS INCORRECT INSOFAR AS IT *REQUIRES* A SHOWING OF UNRESPONSIVENESS TO SUSTAIN A CHALLENGE TO AT-LARGE ELECTIONS	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases Page

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 4, 5, 10
Avery v. *Midland County*, 390 U.S. 474 (1968) 5
Brown v. *Board of Education*, 347 U.S. 483 (1954) 29
Chapman v. *King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800 (1946) 21
City of Mobile v. *Bolden* 446 U.S. 55 (1980) 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 26, 28, 29
City of Rome, Georgia v. *United States*, 446 U.S. 156 (1980) 15
Columbus Board of Education v. *Penick*, 443 U.S. 449 (1979) 7, 8, 19
Connor v. *Finch*, 431 U.S. 407 (1977) 4, 10
Connor v. *Johnson*, 402 U.S. 690 (1971) 4
Dayton Board of Education v. *Brinkman*, 443 U.S. 526 (1979) 7, 18, 19
East Carroll Parish School Board v. *Marshall*, 424 U.S. 636 (1976) 4
Flax v. *Potts*, 404 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1002 (1972) 19
Gaston County v. *United States*, 395 U.S. 285 (1969) 23
Green v. *County School Board of New Kent County*, 391 U.S. 430 (1968) 17
Keyes v. *School District No. 1*, 413 U.S. 189 (1973) 18
Kirksey v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977) 15, 16, 23, 24
Lodge v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981) 3, 19, 24, 28
Louisiana v. *United States*, 380 U.S. 145 (1965) 16, 17
McGill v. *Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976) 21
McMillan v. *Escambia County, Florida*, 639 F.2d 1239 (5th Cir. 1981) 21, 29

TABLE OF AUTHORITIES—Continued

Page

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 265 (1979) 4, 20
Reitman v. *Mulkey*, 387 U.S. 369 (1967) 15
Smith v. *Allwright*, 321 U.S. 649 (1944) 25
Stewart v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) 14
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 18, 19
Village of Arlington Heights v. *Metropolitan Development Corporation*, 429 U.S. 252 (1977) 5, 7, 9, 14, 15, 20, 29
Washington v. *Davis*, 426 U.S. 229 (1976) 1, 3, 5, 6, 15, 16, 20
Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 2
White v. *Regester*, 412 U.S. 755 (1973) 1, 2, 3, 4, 5, 15, 16, 17, 19, 25
Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) 15, 16, 28

Statutes

42 U.S.C. § 1973 .....8, 9, 22, 23
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Campbell, A., et. al., THE AMERICAN VOTER (1960) 24
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TABLE OF AUTHORITIES—Continued

Page

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Hays, S., *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NORTHWEST Q. 157 (1964) 12

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KOUSSER, J., THE SHAPING OF SOUTHERN POLITICS (1974) 21

Karnig, A., *Black Representation on City Councils*, 12 URB. AFF. Q. 223 (Dec. 1976) 6

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Rice, B., PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA, 1901-1920 (1977) 12, 13

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Weinstein, J., THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918 (1968) 12

Weinstein, J., *Organized Business and the City Commissioner and Management Movements*, 28 J.S. HIST. 166 (1962) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

80-2100

QUENTIN ROGERS, *et al.*,

Appellants,

v.

HERMAN LODGE, *et al.*

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

The interest of the Lawyers' Committee for Civil Rights Under Law in this matter is set out in the Motion for Leave to File this brief which is appended hereto.

SUMMARY OF ARGUMENT

1. The evidence in the record amply supports the finding of the District Court that at-large elections for the County Commission of Burke County, Georgia have been maintained with the intent of continuing the historical exclusion of black citizens in Burke County from the political processes. This is clear because the evidence and findings are comparable to the indications of discriminatory intent found in *White* v. *Regester*, 412 U.S. 755 (1973), which was reaffirmed by *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Moreover, the evidence and findings conform to a number of factors which this Court, in a line of cases since *Washington* v. *Davis*, 426 U.S. 229 (1976), has said provide strong indicia of discriminatory intent.

2. Even if the evidence does not show discriminatory intent in the direct adoption or maintenance of this at-large election plan, the plan is nevertheless unconstitutional because it perpetuates the present effect of a prior intentional and unconstitutional exclusion of black citizens from the political process. This standard comports with the Court's previous decisions in vote dilution and school desegregation cases, and also focuses on the issue of discriminatory intent as required by the Court's holdings in equal protection cases. As found by the District Court, prior intentional and unconstitutional discrimination has excluded the black citizens of Burke County, Georgia from the political process, and the at-large plan for electing county commissioners in Burke County perpetuates that exclusion.

3. The Court of Appeals incorrectly held that proof of unresponsiveness is necessary to the successful maintenance of a constitutional challenge based on grounds of racial vote dilution. This conclusion, unnecessary to the resolution of the instant case, is based on a misreading of the plurality opinion in *Mobile*, and is inconsistent with previous holdings of this Court.

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT AT-LARGE ELECTIONS HAVE BEEN MAINTAINED IN BURKE COUNTY FOR THE DISCRIMINATORY PURPOSE OF DENYING BLACKS EQUAL ACCESS TO THE POLITICAL PROCESS IS CORRECT AND SHOULD BE SUSTAINED.

At-large voting is not unconstitutional *per se*, but is unconstitutional if it has been conceived, operated, or retained "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion); *see also*, *White* v. *Regester*, 412 U.S. 755, 765 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971). The *Mobile* plurality concluded that plaintiffs' burden is to prove "that the disputed plan was 'conceived or oper-

ated as [a] purposeful devic[e] to further racial . . . discrimination.'" 446 U.S. at 66. However, the opinion of the plurality has been criticized as failing to provide adequate guidance to the lower courts in determining discriminatory purpose in vote dilution cases, and in particular "because it refused to draw inferences that are reasonable in light of the Court's intent decisions since *Washington* v. *Davis*, [426 U.S. 229 (1976)]." Note, *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 147 (1980). This case gives this Court an opportunity to clarify *Mobile* and provide additional guidance.

We respectfully submit that the trial court's finding of intentional discrimination in the maintenance of Burke County's at-large election scheme was properly affirmed below on two separate grounds: first, because the proof that blacks were excluded from the political process in Burke County met the requirements of *White* v. *Regester*; and second, because the evidence more than amply established intent under more recent decisions of this Court. Our discussion of the evidence in the instant case will focus on the indicia of intent identified in those more recent decisions.

As the Court of Appeals in this case correctly points out,

> In a voting dilution case in which the challenged system was created at a time when discrimination may or may not have been its purpose, it is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination.

Lodge v. *Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981) (footnotes omitted). "Quite simply, there will be no 'smoking gun.'" *Id.* at 1363 n. 8. This Court has made it clear from *Washington* v. *Davis* that: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . ." 426 U.S. at 242.

Indeed, this Court has never required proof of overt racial statements or a subjective state of mind of racial intent. "Proof of discriminatory intent must necessarily rely on objective factors," *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 265, 279 n. 24 (1979), and requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Furthermore, to prevail, plaintiffs need not prove that a racial purpose was the sole, dominant, or even the primary purpose for a challenged action, but only that it "has been a motivating factor in the decision." *Arlington Heights*, *supra*, 429 U.S. at 265-266. "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Personnel Adm'r of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 277 (1979).

While the evidence in the instant case certainly proves a constitutional violation in light of a *White* v. *Regester* analysis,[1] which was reaffirmed by the *Mobile* plurality

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[1] The *Mobile* plurality's suggestion that a constitutional distinction may exist between multi-member legislative districts and local at-large governments, 446 U.S. at 70, is untenable and, at the very least, inapplicable to this case. There is nothing in *White* v. *Regester* or this Court's other cases to indicate that the *White* v. *Regester* analysis hinged on the presence of legislative districts as opposed to other units of government. The potential harm involved—the submersion of electoral minorities—is present both in multi-member legislative districts and local at-large election plans, *see Connor* v. *Finch*, 431 U.S. 407, 415 (1977), and *Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969), and this Court has therefore expressed its strong preference for single-member districts in court-ordered reapportionment plans in both the legislative and local government contexts. *See Connor* v. *Johnson*, 402 U.S. 690 (1971), and *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976). Furthermore, there is no distinction expressed in this Court's malapportionment cases, which, like racial dilution cases, involve claims of diminished voting power. *Allen*, *supra*, 393 U.S. at 569. The malapportionment doctrine applies in like

(446 U.S. at 69-70),[2] it also supports a finding of discriminatory intent reached by considering factors identified in decisions of this Court since *Washington* v. *Davis*. It is those factors upon which this discussion will focus, rather than a *White* v. *Regester* factual analysis. As detailed below, the District Court's conclusion, affirmed by the Fifth Circuit, that "the present scheme of electing county commissioners . . . is being *maintained* for invidious purposes" (J.S., App. 71a) is amply supported by subsidiary findings of fact and evidence giving rise to inferences which this Court has held in prior cases are sufficient to support a conclusion of discriminatory purpose.

1. *Discriminatory impact.* In determining whether or not at-large voting is being retained for a discriminatory purpose, "[t]he impact of the official action—whether it

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fashion to local governments and state legislatures. *Avery* v. *Midland County*, 390 U.S. 474, 485 (1968).

The *Mobile* plurality's intimation of a constitutional distinction was accompanied by two observations apparently thought to give support to that distinction: (1) that the Mobile City Commission exercised not only legislative policymaking power, but also executive and administrative power, therefore requiring that each city voter cast an at-large ballot for each of the city commissioners, all of whom would exercise citywide administrative and executive functions; and (2) that at-large municipal elections were once "universally" heralded as good-government reforms. 446 U.S. at 70 and n. 15. The two observations are irrelevant to the present case—the first because the Burke County Commission exercises only legislative policymaking power, and not executive or administrative functions, and the second because it pertains to the history of municipal governments and not county governments. Additionally, as demonstrated later in this brief, the accuracy of the plurality's historical conclusion is highly questionable in light of recent historical research. And even if good-government reform played *some* part in the institution of the commission form of government in *some* American cities, that is no basis for making constitutional distinctions which affect the standards governing voting rights cases in *all* local governments, city and county.

[2] Justice Stevens appears also to have reaffirmed *White* v. *Regester*. 446 U.S. at 84, n. 2, as did Justice Blackmun and the *Mobile* dissenters.

'bears more heavily on one race than another,' *Washington* v. *Davis* [426 U.S.] at 242—may provide an important starting point." *Mobile, supra,* 446 U.S. at 70. As Justice Stevens aptly noted in *Washington* v. *Davis,*

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

426 U.S. at 253 (concurring opinion).

Here the District Court found that no black candidate has ever been elected to the County Commission, despite the fact that Burke County has historically been majority black in population (J.S., App. 66a). The District Court also found that when blacks ran for the County Commission, they carried majority black districts, but lost in countywide voting (*id.*, App. 72a-73a), and that when at-large elections were abolished in Waynesboro, the county seat, and single-member districts were implemented, there was an increase in black representation on the city council (*id.*, App. 73a).[3]

The District Court also found that the discriminatory impact of countrywide voting was enhanced by the large

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[3] Among social scientists, there is little question that at-large voting is racially discriminatory. Numerous empirical studies based on data collected from throughout the nation have found a direct causal relationship between at-large elections and exclusion of minority representation. *See, e.g.,* C. Davidson and G. Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence,* 43 J. OF POL. 982-1005 (Nov. 1981); R. Engstrom and M. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship,* 75 AM. POL. SCI. REV. 344-354 (June 1981); D. Taebel, *Minority Representation on City Councils,* 59 SOC. SCI. Q. 143-52 (June 1978); T. Robinson and T. Dye, *Reformism and Black Representation on City Councils,* 59 SOC. SCI. Q. 133-41 (June 1978); A. Karnig, *Black Representation on City Councils,* 12 URB. AFF. Q. 233-43 (Dec. 1976); C. Jones, *The Impact of Local Election Systems on Black Political Representation,* 11 URB. AFF. Q. 345-56 (March 1976).

geographic size of the county which "has made it more difficult for blacks to get to polling places or to campaign for office" (*id.*, App. 91a), by the Georgia statutory majority vote requirement (Ga. Code Ann. § 34-1513) which "tends to submerge the will of the minority and to deny the minority's access to the system" (*id.*, App. 92a), by the numbered post requirement (Ga. Code Ann. § 34-1015) which "enhance[s] plaintiffs' lack of access to the system" (*id.*), and by the lack of any district residency requirement, so that "[a]ll candidates could reside in Waynesboro, or in 'lilly-white' neighborhoods" (*id.*, App. 93a).

The record in this case shows not only that the county-wide voting scheme has a racially disproportionate impact, but also that local white officials responsible for maintaining at-large voting concede and are fully aware that no black can get elected to the County Commission under this at-large system. (Tr., p. 168). This Court has recognized that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Columbus Bd. of Educ.* v. *Penick*, 433 U.S. 449, 464 (1979); *see also*, *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526, 536 n. 9 (1979) ("proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose"). Since the responsible officials were aware and could reasonably foresee that the maintenance of this at-large election system would continue the historic exclusion of black representation from county government, it was appropriate for the District Court to infer that this discriminatory impact was intended.

2. *Pattern and practice of racial discrimination.* In proving discriminatory purpose, this Court has held: "The historical background of the decision is one evidentiary source, particulary if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, *supra*, 429 U.S. at 267. The findings of the District Court indicate that black citizens in Burke County

have been discriminated against and segregated in every aspect of public life, including political and electoral affairs, and that this racial discrimination and segregation is continuing down to the present time. Prior to the passage of the Voting Rights Act of 1965, blacks in Burke County were denied the right to register and vote by literacy tests, poll taxes, and white primaries, all maintained by county officials under color of state law (J.S., App. 71a-72a, 86a). Since the enactment of the Voting Rights Act, the County Commission has continued to deny the county's black citizens polling places and the opportunity to register and vote (J.S., App. 81a).

In addition, the District Court found that the County Commission continues to discriminate against black citizens in appointments to boards and commissions which oversee the execution of county government (J.S. App. 76a, 78a), in judicial appointments (*id.*, App. 78a-79a), by maintaining a discriminatory hiring policy for county employment (*id.*, App. 75a-76a, 79a), in paving of county roads (*id.*, App. 79a-80a), and by participating in the establishment of the Edmund Burke Academy, a segregated, all-white private school established to circumvent public school desegregation (*id.*, App. 81a-82a). The county's practice of racial discrimination in grand jury selection continued until 1977, when it was terminated under compulsion of court order (*id.*, App. 75a).

In short, whenever officials in Burke County came to a "crossroads where [they] could either turn toward [burdening minorities] or away from it," *Columbus Bd. of Educ.* v. *Penick*, *supra*, 443 U.S. at 463, n. 12, they consistently chose the alternative with the greatest discriminatory impact. Such evidence is highly probative of discriminatory intent. *Id.*

Indeed, this proof goes beyond the mere fact of unresponsiveness of the elected county officials to black needs and interests, which the *Mobile* plurality said "is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral sys-

tem under which they attained their offices" (446 U.S. at 74), and the "original sin" (*id.*) of past discrimination. The findings of the District Court clearly demonstrate an official county policy of excluding black citizens from full participation in county government, a policy which is furthered and enhanced by the county's discriminatory at-large voting system, and of which at-large voting is an integral part. Moreover, in contrast to *Mobile*, the record here shows that blacks in Burke County do not always register and vote "without hindrance." *See Mobile, supra*, 446 U.S. at 73. Thus, this evidence of historic and present invidious discrimination against the black community gives rise to an inference, which was drawn by the District Court and affirmed by the Court of Appeals, that the county's at-large election scheme which excludes any opportunity for black representation is being maintained specifically for an invidious racial purpose.

3. *Lack of an adequate, nonracial reason.* The absence of a legitimate nonracial reason for a challenged action is probative of discriminatory intent, "particularly if the factors usually considered important by the decisionmakers strongly favor a decision contrary to the one reached." *Arlington Heights, supra*, 429 U.S. at 267 (footnote omitted). In at-large election challenges, this inquiry involves an analysis of the context in which at-large voting is maintained. *See, e.g., Mobile, supra*, 446 U.S. at 60-61 (plurality opinion).

Following the passage of the Voting Rights Act, giving blacks in Georgia the right to vote for the first time since Reconstruction, 18 Georgia counties switched from district elections to at-large elections. (T. 398-99). This pattern also was evident in other states covered by the Voting Rights Act,[4] providing evidence of discriminatory motivation behind at-large countywide voting.

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[4] For example, in Mississippi, 13 counties attempted to switch to at-large voting for members of boards of supervisors, the county governing board, and 22 counties attempted to switch to at-large

The District Court did not find any countervailing legitimate, nonracial reason for maintaining at-large countywide county commission elections in Burke County. It further found that the adoption of single-member districts would not impair the county's ability to function and could be reasonably accomplished (J.S., App. 91a, 96a). The system of government involved in this case, then, contrasts sharply with the system challenged in *Mobile*, in which "an entire system of local governance [was] brought into question" (446 U.S. at 70).

In *Mobile*, the fact that each of the Mobile, Alabama city commissioners was vested with both executive and administrative powers was alluded to by this Court as a potential non-racial justification for a system under which all voters cast ballots for all members of the city commission, inasmuch as it would be anomalous to elect a public official with a particular executive and administrative responsibility for the entire city (such as the commissioner in charge of public safety) from a limited geographic portion of the city. *See Mobile, supra*, 446 U.S. at 70. This is in contrast to a purely legislative policy-making body in which the responsibilities of each member are the same, and where each citizen is considered to have an adequate voice by voting for a single legislator who represents a specific geographic area. *See Connor* v. *Finch, supra*, 431 U.S. at 415. Unlike the Mobile City Commission, the Burke County, Georgia Board of Commissioners is purely a policymaking body, where each member's responsibilities are alike, and none possess executive or administrative functions.[5] Thus, there is no non-racial justification based on executive

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elections for county school board elections. *See Fairley* v. *Patterson, decided sub. nom. Allen* v. *State Bd. of Elections*, 393 U.S. 544, 550, 569, 574-576 (1969); U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 271 (1975).

[5] Executive duties are vested in the County Administrator, who is appointed.

and administrative responsibilities which underlies at-large elections in Burke County.[6]

Because of this distinction, "purpose" and "effect" are much more closely related in the instant case than in *Mobile*. There, the plurality said:

> The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point . . . But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, *an entire system of local governance is brought into question*, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.

446 U.S. at 70 (emphasis added). Since, in this case, "an entire system of local governance" is not at issue, disproportionate impact will be more probative of discriminatory intent, for a non-racial justification is not apparent. Indeed, the showing of racial impact is extremely relevant to a finding of purpose in the present lawsuit because the governmental decision at issue involves not a choice of an entire local governance system, but only a choice regarding electoral districting. Any such districting decision is merely a determination of which groups of voters will have the deciding votes in electing particular public officials. In essence, the goal of an apportionment scheme is the allocation of political power. Apportionment decisions are directly reflected in the resulting distribution of electoral power: which groups of voters possess power and which ones do not. The purpose, therefore, is commensurate

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[6] Justice Stevens expressed the view in *Mobile* that there can always be "a substantial neutral justification for a municipality's choice of a commission form of government . . . ." 446 U.S. at 92, n. 14 (concurring opinion). Insofar as that justification consists of the desire to have all city voters participate in the choice of officals who will exercise citywide executive and administrative power, it is unavailing to the defendants in this case.

with the result, and the result is a strong indication of the purpose.

Finally, and contrary to appellants' submission, (Br. 32, 41), the *Mobile* plurality's observations concerning the popularity and historical development of at-large municipal elections are irrelevant here, since they relate only to the development of municipal governments in America and not to at-large elections for county government.[7] Moreover, the thesis that at-large municipal elections were "universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government" (*Mobile, supra*, 446 U.S. at 70 n. 15) is flatly contradicted by the most recent and exhaustive research on the subject, contained in Rice, PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA, 1901-1920 (University of Texas Press, 1977).

Dr. Rice's detailed historical analysis shows that the adoption of at-large voting under commission forms of municipal government in the early 1900s was generally the result of power struggles for the control of municipal government in which the white "business elites" (his term) used at-large elections to wrest political control from working class, ethnic, and minority citizens. *Id.* at xvi, 4-18, 26-29, 34-51, 60-61, and *passim*.[8] Far from

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[7] Unlike municipalities, a majority of which maintain at-large, citywide election systems (*Mobile, supra*, 446 U.S. at 61),

> [A] majority of all counties in the Nation are governed by popularly elected officials who represent districts or areas within their respective counties.

U.S. Bureau of the Census, *Governing Boards of County Government: 1973* (Series SS No. 68) 4 (1974).

[8] Dr. Rice's research and conclusions are amply supported by prior research in the field. *See, e.g.*, J. Weinstein, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918, ch. 4 (1968); S. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. N.W. Q. 157-69 (1964); J. Weinstein, *Organized Business and the City Commissioner and Management Movements*, 28 J. S. HIST. 166-82 (1962).

being "universally heralded" as a progressive reform measure, the spread of at-large municipal elections was bitterly opposed by organized labor (with some exceptions), working class elements, and ethnic and racial minorities who feared, quite correctly, that at-large voting would exclude them from participation in municipal government. *Id.* at 27-29, 47, 78, 84-89. Indeed, Rice concludes that a causal relationship can be inferred between black population in cities and the adoption of the commission form of municipal government (*id.* at 89), and notes: "Ethnic minorities were rightly suspicious of at-large elections that ended their close association with ward politics" (*id.* at 88).

A number of social reformers of the day fought the move to at-large voting for the reason that it diminished the impact of ethnic and minority votes (*id.* at 85), and Charles Beard, the noted contemporary political scientist, cautioned against at-large voting in his 1912 textbook on municipal government, stating that it "substantially excludes minority representation" (*id.* at 78).

Dr. Rice's research also cautions against any assumption that the initiation or continuation of at-large governmental schemes in municipal America was motivated only by good-government considerations. In many cities, at-large governments failed to increase efficiency or to eliminate factional bickering and boss politics. *Id.* at 88-99, 111. Although there was evidence of improvement in some municipalities, contemporary writers also criticized commission government municipalities for poor debt management, internal strife, extravagance, and lack of expert management. *Id.* at 96-97.

> In some cities the populace had simply traded the logrolling and political tradeoffs of ward politics for similar tactics among semi-autonomous departments.

Id. at 91.

Thus, even if this case involved a city rather than a county government, we would urge the Court to reject

the notion that the *Mobile* panel's generalized observation—which should in any event be reevaluated in light of relevant historical scholarship—can furnish a legitimate, non-racial reason for the perpetuation of at-large voting for Burke County Commissioners. Even less supportable is the suggestion that the plurality's generalization outweighs or rebuts the other substantial evidence of discriminatory intent in the record, or that it can substitute for a particularized inquiry—as was performed by the District Court here—into the motivation for retaining an at-large election scheme in a specific locality. *Cf. Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court).

4. *Sequence of Events.* According to the court's decision in *Arlington Heights*: "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." 429 U.S. at 267.

In 1964, as the Civil Rights Movement reached its zenith and voter registration drives were underway in Georgia, the state legislature instituted majority vote and numbered post requirements—both of which disadvantage black voters—for all at-large county commission elections in Georgia, including those in Burke County. (J.S. App., 65a, n. 2). This matter of timing [9] is one of the pieces of evidence which shows that at-large elections were maintained for racially discriminatory reasons, for both measures have a discriminatory effect on black political participation.[10]

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[9] *See Arlington Heights, supra*, 429 U.S. at 267, n. 16 and accompanying text.

[10] Of course, plaintiffs here challenge the entire at-large scheme in Burke County, not just these particular characteristics. But evidence about the characteristics is highly relevant to the ultimate issue, for if they were adopted for a racially discriminatory reason, then the electoral system of which they are a part was obviously maintained for purposes of racial discrimination.

Moreover, the addition of these provisions indicates a substantive departure from normal state policy, in the *Arlington Heights* sense, since they were obviously considered unnecessary to the functioning of at-large elections prior to 1964. Indeed, there is no adequate non-racial explanation for the majority vote and numbered post requirements and the absence of a residency requirement—all of which disadvantage black voters—for there is nothing in the nature of at-large election schemes which requires these characteristics. *See generally, City of Rome, Georgia* v. *United States*, 446 U.S. 156, 183-185 and nn. 19-21 (1980); *White* v. *Regester, supra*, 412 U.S. at 766.

Because the District Court's conclusion of discriminatory purpose—affirmed by the Court of Appeals—relies on findings and evidence which sufficiently portray unconstitutional intent as defined by previous decisions of this Court, the judgment below should be affirmed.

II. THE CONSTITUTION PROHIBITS AT-LARGE ELECTIONS WHICH HAVE THE EFFECT OF PERPETUATING OFFICIAL AND INTENTIONAL DENIAL TO BLACKS OF EQUAL ACCESS TO THE POLITICAL PROCESS.

An at-large voting system, though itself racially neutral, violates the Fourteenth and Fifteenth Amendments if it perpetuates an intentional and purposeful racially discriminatory denial of access to the political process. This perpetuation standard, which was approved in *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 143-144, 146 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977), properly examines the "historical context and conditions" of a challenged governmental action. *Reitman* v. *Mulkey*, 387 U.S. 369, 373 (1967). Additionally, it focuses on the issue of discriminatory *intent*, and thereby meets the Fourteenth Amendment requisites of *Washington* v. *Davis*, and the plurality opinion in *Mobile*.[11] The *Kirksey* Court explained:

[11] *Kirksey* is consistent with the opinions and the decision in *Mobile*. Rather than relying on the type of *Zimmer* v. *McKeithen*

> If a neutral plan were permitted to have this discriminatory effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue unabated. Such a rule would *sub silentio* overrule *White* v. *Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

554 F.2d at 147. This Court itself has acknowledged that, in the area of voting rights, the proper response to prior unconstitutional acts includes eliminating "the discriminatory effects of the past." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

This constitutional analysis comports with the Court's unanimous decision in *White* v. *Regester*, which was reaffirmed in *Mobile*.[12] The ultimate proof required by *White* v. *Regester* was exclusion from the political system—a showing that "the political processes leading to nomination and election were not equally open to participation by the group in question." 412 U.S. at 766. This could be done, according to the Court, by proof of current exclusionary effect *along with* a demonstration of prior official discrimination—political and otherwise. Thus, of evidentiary importance were such things as a

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(485 F.2d 1297 (5th Cir. 1973)) laundry-list presumption disapproved by the *Mobile* plurality, the *Kirksey* Court focused on intent and found prior intentional discrimination, the exclusionary effects of which were perpetuated by the electoral scheme at issue.

To the extent that *Kirksey* relied upon or reflected the *Zimmer* analysis, it can be disregarded, allowing the perpetuation standard forwarded here to be viewed independently of *Zimmer*.

[12] It is clear that all of the opinions in *Mobile* approved the result in *White* v. *Regester*. The *Mobile* plurality concluded that *White* v. *Regester* rested upon an intent standard consistent with *Washington* v. *Davis*, and Justice Stevens' separate opinion did not disagree with *White* v. *Regester*, nor did Justice Blackmun or the dissenters.

history of official discrimination which touched on the political processes, historical exemption of blacks from the political party process, prior use of the poll tax and restrictive voter registration procedures, and historical discrimination which resulted in present low levels of minority voter registration. The perpetuation of the purposeful political exclusion caused by these prior instances of official discrimination compelled the Court to declare the multi-member districts at issue in violation of the constitution. It should be noted that the Court did *not* undertake an examination of the Texas government's motivation in 1970 in designing the districts. Nor was it considered necessary to demonstrate a causal link between the particularized effects of the multi-member districts and prior discrimination. It sufficed to show that prior purposeful official discrimination caused political exclusion of racial minorities, that the exclusion remained, and that it was perpetuated by the multi-member districts.[13]

A similar perpetuation standard has been consistently employed in school desegregation cases. In *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), the Court articulated the duty of a school board to disestablish an unconstitutional dual school system. *Green* said that "freedom of choice" plans are not unconstitutional *per se*, but must be invalidated if they continue the segregative effect of the prior statutorily mandated dual school system.

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[13] This Court described with approval the District Court's action with regard to Bexar County, Texas: "Single-member districts were thought required to remedy 'the effects of past and present discrimination against Mexican-Americans,' [343 F. Supp. 704, 733], and to bring the community into the full stream of political life of the county and state by encouraging their further registration, voting, and other political activities." *White* v. *Regester*, *supra*, 412 U.S. at 769. Obviously, the Court felt that the Constitution requires eradication of the *effects* of past and present discrimination. *See Louisiana* v. *United States*, *supra*, 380 U.S. at 154.

Three years later, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), emphasized that a school district has the constitutional duty to eliminate every vestige of state-imposed segregation. The Court noted that the Constitution is not satisfied by racially "neutral" government actions which allow the effects of prior unconstitutional discrimination to remain.

> "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. *In short, an assignment plan is not acceptable simply because it appears to be neutral.*

402 U.S. at 28 (emphasis added). *See also Keyes* v. *School District No. 1*, 413 U.S. 188 (1973). Similarly, when prior intentional discrimination in the area of voting rights presents black citizens with a "loaded game board," it is constitutionally insufficient to justify as racially "neutral" an electoral scheme which leaves the game board loaded by perpetuating past discrimination.

Only recently, in *Dayton Bd. of Educ.* v. *Brinkman (Dayton II)*, *supra*, the Court reiterated that a school board guilty of past intentional discrimination must avoid actions which have "the effect of increasing or perpetuating segregation." The measure of conduct under that duty "is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the system." Thus, the school board must "do more than abandon its prior discriminatory purpose." It must see that "pupil assignment policies and school construction and abandonment practices 'are not used and do not

serve to *perpetuate* or re-establish the dual school system.' " 443 U.S. at 538, *quoting Columbus Bd. of Educ.* v. *Penick, supra*, 443 U.S. at 460.

Dayton II and the other school cases illustrate that plaintiffs need not prove a direct causal link between prior discrimination and the discriminatory effects of the particular decision being challenged. For instance, if a challenge were brought to a neutrally motivated decision about the location of a new school in a formerly dual—and not yet unitary—system, plaintiffs would not be required to show that the particular and isolated discriminatory effect of the location (such as the projected one-race character of the school's enrollment) was the direct result of prior intentional discrimination; rather, it need only be demonstrated that the location perpetuates the segregation which has resulted from past maintenance of the dual system. 443 U.S. at 538. *See also, e.g., Flax* v. *Potts*, 404 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1002 (1972). Similarly, plaintiffs herein need not show that the effects of the at-large scheme itself directly resulted from prior discrimination;[14] they need only show that it actually perpetuates the direct effects of the past intentional discrimination.[15]

This Court has already made clear that the perpetuation principle is not limited to school desegregation cases. As Chief Justice Burger noted for a unanimous court in *Swann*, school cases do not differ from other types of litigation when it comes to the repair of a denial of constitutional rights. 402 U.S. at 15-16. Furthermore, the use of the perpetuation standard in the school deci-

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[14] Certainly there is evidence to make that proof, even though it is not required. For past discrimination directly caused current low voter registration levels for blacks and current bloc voting, both of which severely disadvantage blacks under the at-large electoral system.

[15] As previously noted, this point was also made by the Court's analysis in *White* v. *Regester*.

sions accords with this Court's emphasis on intent in other types of equal protection cases. *Washington* v. *Davis* specifically noted that the school desegregation cases have "adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must *ultimately be traced* to a racially discriminatory purpose." 426 U.S. at 240 (emphasis added).[16]

Moreover, the perpetuation standard was not rejected in *Washington* v. *Davis*, *Arlington Heights*, and *Personnel Administrator* v. *Feeney*, all of which examined only the present intent behind challenged enactments, and not the perpetuation of prior discrimination.[17] Finally, by allowing evidence of past history and current impact in the search for "ultimate" intent, *Washington* v. *Davis* and *Arlington Heights* obviously permit application of the perpetuation standard which links prior intentional discrimination with the maintenance of discriminatory effects. *Washington* v. *Davis*, *supra*, 426 U.S. at 242; *Arlington Heights*, *supra*, 429 U.S. at 267.

The record below and findings of the District Court amply support the conclusions that (1) prior purposeful discrimination resulted in the denial of equal access to the political process; (2) the effects of the intentional denial remain; and (3) the denial of equal access is perpetuated by the at-large system.

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[16] *See also Personnel Administrator* v. *Feeney*, *supra*, 442 U.S. at 272 ("if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause . . . if that *impact can be traced* to a discriminatory purpose." (emphasis added)).

[17] *Feeney* held that the Massachusetts legislature was not unconstitutionally motivated simply because it adopted a veteran's preference which had the foreseeable effect of perpetuating the *federal* government's intentional discrimination against women through its military policy. But *Feeney* did not involve a situation where, as here, the challenged decision is that of the particular governmental units whose own prior discrimination is being perpetuated.

1. *Prior purposeful discrimination*

It was not long after the Civil War ended that the State of Georgia began its successful efforts to disfranchise the newly freed black citizens. A poll tax was instituted in 1871, followed by a cumulative poll tax in 1877 which was specifically designed to eliminate blacks from the voter registration rolls. The white primary began its life in Georgia in 1898, with the final blow administered in 1908 by the passage of a comprehensive state constitutional suffrage amendment, which included manipulable tests for literacy and understanding, a property ownership requirement, and a grandfather clause. The overwhelming historical evidence shows that all of these measures were adopted with the express purpose of preventing blacks from voting.[18]

The white primary was not struck down until 1946 (J.S. at 74a; *Chapman* v. *King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800 (1946)), and even after that blacks remained totally disfranchised in Georgia because of a combination of state and county government actions, including the poll tax and arbitrary administration of the literacy test. (J.S. App., 86a). It was 1965, with

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[18] J. Morgan Kousser, THE SHAPING OF SOUTHERN POLITICS, (Yale University Press, 1974), pp. 209-223, 239. It is interesting to note that the historical background of the 1908 Georgia Amendment clearly refutes the reasoning of those courts which automatically conclude that voting measures passed during a time of widespread black disfranchisement could not have been tainted by discriminatory intent. *See e.g.*, *McMillan* v. *Escambia County, Florida*, 638 F.2d. 1239, 1244 (5th Cir. 1981); *McGill* v. *Gadsden County Commission*, 535 F.2d 277, 280-281 (5th Cir. 1976). Despite the fact that only a few blacks were able to vote immediately prior to 1908 because of the existent poll tax and white primary, the suffrage amendment was nevertheless passed with the express purpose of providing extra insurance against blacks ever voting again. *Kousser, supra*, at 221. Governments caught in the grip of a period of racist fever often react with extreme and duplicative measures which far exceed that which is necessary to accomplish their invidious ends. *See* James Silver, MISSISSIPPI: THE CLOSED SOCIETY (Harcourt, Brace & World, 1964).

the passage of the Voting Rights Act, before blacks were even able to begin registering in significant numbers. However, in Burke County, Georgia, governmental authorities did not give up their fight against black suffrage, and intentional obstacles continued to be thrown in the path of black political participation well into the 1970s.[19] The County attempted to eliminate all but one polling place (Pl. Ex. 11; T. 42) and maintained only one registration site for years (J.S. App., 81a), thus making it difficult for the disproportionately impoverished black citizens to travel for the purpose of exercising their electoral rights. Voter registration was limited to one day, with an additional short period on Saturday morning which itself was later eliminated. (Pl. Ex. 7, 10, 41; T. 39, 41, 56).

Furthermore, the District Court's findings of fact show that the registration of potential black voters was being hindered by the County Commissioners' "sluggishness' even after commencement of this lawsuit. (J.S. App., 81a). According to the evidence, blacks for ten years sought registration sites in each of the 15 voting districts, but were falsely told by county officials that registration was illegal unless conducted at the courthouse; intervention from the Georgia Secretary of State was sought before this charade ended. (T. 734). Three additional sites were finally approved, but were open only for a few days prior to the 1976 election. (Pl. Ex. 99; T. 639; *see* J.S. App., 81a). Even then, there were instances of intentional efforts by county officials to prevent blacks from registering. (T. 319-321, 952).[20] The county steadfastly refused to appoint black deputy regis-

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[19] The Court of Appeals noted that the Burke County Commissioners made it necessary for blacks to go to court in an effort to obtain the right to register and vote. 639 F.2d at 1376-1377.

[20] These instances, along with other evidence of political exclusion, show that this case is unlike *Mobile*, where the District Court found that blacks register and vote "without hinderance." 446 U.S. at 73.

trars, despite the willingness of several black citizens to serve voluntarily. (T. 724, 953-956).

Literacy and understanding tests, long the tools of black disfranchisement, were readopted by the 1976 Georgia Constitution, Ga. Code § 2-403, and are inoperative only because of the Voting Rights Act.

In addition to discrimination touching directly on the political processes, there is extensive evidence and findings regarding the plethora of past official discrimination which pervaded Georgia[21] and Burke County in all walks of life, and which was found by the District to have caused blacks to suffer inadequate educational opportunities and overall socioeconomic disparities, which, in turn, affect their ability to participate in the political process. (J.S. App. 74a, 81a-84a).[22] *Cf. Gaston County* v. *United States*, 395 U.S. 285, 297 (1969) (in a county which previously provided blacks with inferior educations in segregated schools, "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form.").

2. *The effects of the intentional denial remain*

As all of this evidence of historical and recent intentional discrimination shows, blacks were totally excluded from the political process until 1965, and continue to be excluded to a greater degree than whites because of the discrimination. The District Court specifically found,

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[21] The District Court took judicial notice of Georgia laws indicative of discriminatory intent. (J.S. App., 76a).

[22] Based in part on expert testimony, the district court found that black citizens, suffering from disproportionately greater poverty than whites, have a generally heightened struggle for the means of daily sustenance, thereby reducing the time, energy, and opportunity for participation in the political process. This was held to be a result of past intentional discrimination. (J.S. App., 83-84 and n. 19). *See Kirksey, supra*, 554 F.2d at 145, n. 13.

and the Court of Appeals agreed,[23] that the intentional exclusion of blacks directly resulted in relatively low voter registration rates,[24] (J.S. App., 71-72; 639 F.2d at 1377-1378), thus inhibiting the efforts of blacks to elect candidates who share their political interests. This low level of registration takes on added significance in light of the fact that blacks constitute a majority of the county population. By prior intentional discrimination, government officials have kept black voter registration disproportionately low, thus preventing blacks from exercising significant political power.

Another consequence of the intentional racial segregation and discrimination practiced for years in Georgia and Burke County is bloc voting. As the District Court's finding indicates, official discrimination created distinct racial interests which manifest themselves at the polling places. (J.S. App., 72-73). Blacks, having suffered so long from the invidious discrimination thrust upon them,

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[23] All of the relevant district court findings of fact were affirmed by the Court of Appeals.

[24] As previously noted, the district court also found that official discrimination causing inadequate educational opportunities and socio-economic disparities which burden black citizens was manifest in low voter registration levels. The Fifth Circuit recognized the myriad ways in which racial discrimination can influence such political factors as voter registration levels: "Failure to register may be, for example, a residual effect of past non-access, or of disproportionate education, employment, income level or living conditions. Or it may be in whole or in part attributable to bloc voting by the white majority, *i.e.*, a black may think it futile to register." *Kirksey, supra*, 554 F.2d at 145, n. 13.

The principle that low socioeconomic status and deprivations in education, income, employment and other areas have a negative impact on opportunities for political participation is firmly established by numerous studies in political science. *See, e.g.*, L. Milbraight, POLITICAL PARTICIPATION, ch. V (1965); W. Erbe, *Social Involvement and Political Activity: A Replication and Elaboration*, 29 AM. SOCIOLOGICAL REV. 198 (1964); A Campbell, et al., THE AMERICAN VOTER, ch. 17 (1960); A. Campbell, G. Gurin, & W. Miller, THE VOTER DECIDES 187-99 (1954).

maintain their own political agenda geared in part to escaping racial oppression, and the majority of Burke County's white voters obviously do not support that agenda.[25]

Additionally, the Democratic Party in Burke County, which maintained segregation through the white primary and other devices of intentional discrimination, is a near reflection of its former self: the Burke County Democratic Executive Committee was for years all white and only recently added one black member. The District Court found that past official electoral discrimination within and without the party process accounted for the current dearth of black political participation in party affairs, which are closely linked to success in the electoral system as a whole. (J.S. App., 74a-75a, 87a-88a).[26]

Past intentional discrimination, according to the detailed findings of the District Court, also led to the paucity of appointments of black citizens to the various governmental boards whose membership is controlled by the Burke County Commissioners. (J.S. App., 76a, 78a-79a). This itself is a measure of exclusion of blacks from the process of government. Moreover, there can be no denial that service in appointed government positions can provide the familiarity with government and public expo-

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[25] This distinguishes the black citizens in Burke County from other political and special interest groups. Republicans cannot ascribe their political differences with Democrats to the burdens of past state-supported racial discrimination. Bloc voting in the black-white context, by contrast, is the vestige of such discrimination, and therefore, takes on constitutional significance. Certainly, without past segregation and discrimination, the political interests of whites and blacks would be much more closely intertwined.

[26] The activities of political parties are sufficiently intertwined with the political process to be considered highly relevant in a case such as this. *See White* v. *Regester*, 412 U.S. at 766-767. *See also Smith* v. *Allwright*, 321 U.S. 642 (1944).

sure that is helpful to electoral bids for public office. Blacks are rarely able to avail themselves of such opportunities because of the exclusionary actions of the Burke County Commissioners.

All of this intentional discrimination, and its well-documented effects, combine to create a situation where blacks were and still are seriously excluded from the political process.

3. *Denial of equal access is perpetuated by the at-large system*

Even when some black citizens escaped the most blatant forms of discrimination, and were able to register and vote, they found themselves confronted by an at-large system of electing county commissioners which, when combined with bloc voting—a continued vestige of racial discrimination—left their vote devoid of meaning in the Burke County Commissioners race.[27] It is no small frustration to work for years against the most flagrant forms of racial injustice to finally gain the freedom to physically place a ballot in the ballot box, only to see the power of that ballot consistently emasculated by a more

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[27] Justice Stevens writes in *Mobile* that voters from a racial minority may have a "critical impact" on municipal or county-wide at-large elections, and that their votes are therefore not rendered meaningless. 446 U.S. at 85, n. 5. This observation is valid only if black voters choose to provide the "swing vote" between competing white candidates. But, as indicated by the evidence of racial bloc voting in the instant case and in others, blacks who have long suffered from discrimination at the hands of white officials and who have long been excluded from the political process cannot realistically be expected to cast their votes for an unwanted candidate whose chance for electoral victory hinges upon the fact that he is white. Moreover, the evidence has shown that even a white candidate who identifies with black interests in Burke County, thereby giving blacks a reason to cast their swing vote for him, will surely suffer defeat at the hands of the bloc-voting white majority. (J.S. App., 73a).

subtle at-large election scheme, which the government can simply defend as racially "neutral."

Rather than seek to ameliorate the effects of political exclusion, the state and county governments have consistently chosen a path which disfavors black citizens. In addition to the refusal to appoint black deputy registrars, the delay in expansion of registration sites, the failure to appoint black members of government committees, etc., there has been the maintenance of at-large elections, the exclusionary effects of which were heightened in the 1960s—after black registration increased—by the addition of majority-vote and numbered-post requirements. (J.S. App., 65, n.2).[28]

In sum, the government has knowingly perpetuated the tragic effects of prior intentional racial discrimination against black citizens in Burke County and the intentional exclusion of those citizens from the political process by maintaining at-large elections in such a way that blacks cannot elect candidates of their choice, whereas in a districting system, such electoral success would be possible.[29]

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[28] The *Mobile* plurality discounted the significance of numbered post and majority vote requirements by saying "they tend naturally to disadvantage any voting minority." 466 U.S. at 74. That point is irrelevant to the instant analysis, for however those features impact other voting groups, it is clear that in this case they disadvantage a racial minority whose political exclusion is directly caused by intentional discrimination. The fact that they also disadvantage other groups—say Republicans—whose relative political exclusion is caused by factors unlinked to lawless discrimination is of no constitutional consequence.

[29] It is not proportional representation which the black citizens of Burke County seek. Were the black population spread evenly throughout the county, electoral success would be prevented even in a districting system because of geographic factors unrelated to the method of election. The plaintiffs would then have no case. But the Burke County black population is not so dispersed, and the plaintiffs seek only that which would occur in the absence of the at-large system.

III. THE OPINION OF THE COURT OF APPEALS IS INCORRECT INSOFAR AS IT *REQUIRES* A SHOWING OF UNRESPONSIVENESS TO SUSTAIN A CHALLENGE TO AT-LARGE ELECTIONS.

In an unprecedented departure from decisions of this Court, the Court of Appeals stated that proof of unresponsiveness is a *prerequisite* to a successful dilution claim, despite the fact that the issue is unnecessary to resolution of the instant case. *Lodge* v. *Buxton*, 639 F.2d at 1373-1374.[30]

Underlying the appeals court's conclusion was an effort to understand the *Mobile* plurality's treatment of *Zimmer* v. *McKeithen*. According to the Fifth Circuit panel, the refusal by the *Mobile* plurality to accept *Zimmer* in its entirety reflected disapproval of the failure of the *Zimmer* plaintiffs to prove unresponsiveness. But the *Mobile* plurality implied no such thing. It disapproved of *Zimmer* to the extent that proof of the "*Zimmer* criteria" had been construed to necessarily create a presumption of discriminatory intent. 446 U.S. at 73. Nothing was said about responsiveness in terms of the *Zimmer* decision.

Indeed, the *Mobile* plurality's statements about unresponsiveness flatly contradict the Court of Appeals' conclusion. According to the plurality, unresponsiveness "is relevant only as the most tenuous and circumstantial evidence" of the constitutional validity of at-large sys-

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[30] Since unresponsiveness was clearly proven by the plaintiffs, according to the District Court and the Court of Appeals, the effect of the absence of such proof need not be decided in this case. Unfortunately, however, the Court of Appeals' decision on this issue needs to be addressed by this Court in the context of this case, lest the Court of Appeals and the District Courts within the Fifth Circuit labor in future cases under the misapprehension that it constitutes a correct application of the law.

tems. 446 U.S. at 74. Certainly, the plurality cannot be thought to imply that "tenuous" evidence is a necessary prerequisite to a successful lawsuit.

Thus, in an opinion which preceded the Court of Appeals' decision below, another panel of the Fifth Circuit concluded that "[a]fter *Bolden* . . . [w]hether current office holders are responsive to black needs . . . is simply irrelevant . . .; a slave with a benevolent master is nonetheless a slave." *McMillan* v. *Escambia County, Florida, supra*, 638 F.2d at 1249 (5th Cir. 1981).

In other areas "responsiveness" has been rejected as an element which defeats a claim of discrimination. For example, in *Arlington Heights*, this Court said that "a consistent pattern of official racial discrimination" is not a necessary predicate to a constitutional violation. "A single invidiously discriminatory government act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions." 429 U.S. at 266, n. 14.

What the Court of Appeals' ruling condones is the maintenance of an otherwise discriminatory exclusion of black voters from the political process simply because they have been provided with roughly equal governmental services. Certainly, school boards which maintain equal funding and services for black students cannot use that excuse to justify placement of those students in a separate school on the basis of race. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Neither, then, can the Court of Appeals' holding stand as an excuse for governments to place black citizens on the outside of the political system simply by spending additional money on them.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, except that its holding that proof of unresponsiveness is a controlling factor in vote dilution cases should be disapproved. Alternatively, if this Court determines that the District Court's findings are insufficient to support its conclusion of unconstitutionality, the judgment should be vacated and the case remanded to the District Court for reconsideration in light of *Mobile*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

QUENTIN ROGERS, *et al.*,

Appellants,

versus

HERMAN LODGE, *et al.*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF APPELLEES.

Pursuant to Rule 36, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the Congressional Black Caucus request

leave to file a Brief Amici Curiae in the instant appeal. Amici are organizations dedicated to protection of the right to vote of minorities, especially Black Americans, in this country.

Appellees have consented to the request. Appellants have not.

Amici assert in their brief that this Court should decide in this appeal no more than that Appellees have submitted sufficient evidence to sustain their burden of proof and persuasion. Amici also argue that the decision herein should be based on evidentiary principles universally applied in the federal courts. These arguments, as developed in the Brief Amici Curiae, have not been presented by the parties. Yet, they are critical for proper disposition of this appeal. For

these reasons, Amici Curiae request leave to file the brief.

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	- iii -
INTEREST OF AMICI	
SUMMARY OF ARGUMENT	1
ARGUMENT	
I. THE ONLY QUESTION WHICH THE COURT SHOULD DECIDE IS WHETHER THERE WAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF DEFENDANTS' DISCRIMINATORY PURPOSE TO ESTABLISH A VIOLATION OF FEDERAL LAW	6
II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY RECOGNIZED THAT UNLAWFUL DILUTION OF A MONITORY VOTING STRENGTH WAS A VALID CAUSE OF ACTION AND CORRECTLY IDENTIFIED THE ELEMENTS WHICH EVIDENCE PROOF OF DILUTION	10
A. Nature of the Claim for Relief ..	10
B. Evidence of Dilution of Minority Voting Strength	16
C. The Zimmer Criteria and Their Significance	19
D. Application of the Zimmer Factors to Prove Dilution	22

PAGE

III. PLAINTIFFS' PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT DEFENDANTS HAD A DISCRIMINATORY MOTIVE IN ADOPTING AND MAINTAINING BURKE COUNTY'S AT-LARGE SYSTEM FOR ELECTING COUNTY COMMISSIONERS 26

A. Standards for Proving Intent 28

B. Applications of the Legal Standards 35

IV. THE THREE CHALLENGED VOTING PRACTICES AND PROCEDURES PERPETUATE A PURPOSEFUL DENIAL OF ACCESS OF BLACKS TO THE POLITICAL PROCESES IN BURKE COUNTY AND MAY BE ENJOYED AS A REMEDIAL MEASURE 54

CONCLUSION 64

INTEREST OF AMICI

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black citizens to secure their constitutional rights through the prosecution and defense of lawsuits. To carry out its purposes, the charter of the N.A.A.C.P. Legal Defense and Educational Fund authorizes the organization to provide legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years, attorneys of the Legal Defense Fund have represented parties in racial discrimination cases before this Court and the lower courts.

The Congressional Black Caucus is composed of the eighteen Black members

of the United States House of Representatives.

The Congressional Black Caucus believes that the right to vote is of fundamental importance because it is preservative of all rights. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Congressional Black Caucus, on behalf of its minority constituents, is concerned that the exercise of this fundamental right be equally accessible to all citizens, especially minority citizens whose right to vote was systematically denied in many parts of this country.

Because of its concern about election schemes that deny blacks on account of their race an effective voice in the governmental affairs of their country, state and community, the Congressional Black Caucus has an interest in the de-

velopment of a reasonable standard of proof for challenging such schemes.

TABLE OF AUTHORITIES

Page

Cases

Chapman v. King, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946) 50

City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980) 3, 7, 8, 9, 20, 21, 22, 26, 34, 37, 48

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 56

Fortson v. Dorsey, 379 U.S. 433 (1965) 11

Green v. New Kent County School Board, 391 U.S. 430 (1963) 48

Keyes v. School District No. 1, 413 U.S. 189 (1973) 56

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977)(en banc) cert. denied, 434 U.S. 968 (1977) 49, 55, 58

Lodge v. Burton, 639 F.2d 1358 (5th Cir. 1981), appeal pending ...41, 47, 61, 63

Louisiana v. United States, 380 U.S. 145 (1965) 48, 64

Page

Cases

Milliken v. Bradley, 433 U.S. 267 (1977) 57, 62, 63

Palmer v. Thompson, 403 U.S. 217 (1940) 34

Swann v. Charlotte Mecklenburg Bd. of Education, 402 U.S. 1 (1971) ... 56

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 10, 28, 30, 32, 33, 47, 53

Washington v. Davis, 426 U.S. 229 (1976) 10, 28, 30, 31, 35

Whitcomb v. Chavis, 403 U.S. 124 (1971) 8, 11, 12, 13, 14, 20

White v. Regester, 412 U.S. 755 (1972) 9, 11, 15, 16, 19, 20, 55, 63

Wright v. Rockefeller, 376 U.S. 52 (1964) 10, 56

Page

Cases

Zimmer v. Mckeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd on other grounds sub nom., East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) 4, 6, 16, 17, 21

Constitutions, statutes and regulations: .....

Fourteenth Amendment cited throughout

Fifteenth Amendment cited throughout

Voting Rights Act of 1965, as amended, 42 'U.S.C. § 1973 .....2, 3, 37 47

Georgia Code Annotated § 34-604 50

Miscellaneous:

McCormick, Evidence (2nd Ed. 1972) .. 38

F.R.E. Rule 401 .....39, 50

F.R.E. Rule 404 .....40, 49, 50

Abbrevations:

The abbrevation J.S. refers to Appellant's Statement as to Jurisdiction.

No. 80-2100

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,

Appellants,

versus

HERMAN LODGE, et al.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE CONGRESSIONAL BLACK CAUCUS

SUMMARY OF ARGUMENT

This Court should affirm the judgment below of the Court of Appeals for the

Fifth Circuit invalidating the at-large election system in Burke County, Georgia on the grounds that it was purposefully maintained by defendents in order to minimize or cancel out the voting strength of black citizens, in Burke County.

Whether the applicable standard of liability under the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, requires proof of intentional racial discrimination or a showing of discriminatory "effects", need not be decided. Under either standard, plaintiffs appellees presented sufficient evidence to demonstrate that appellants purposefully have maintained the County's at-large system for racially discriminatory reasons.

The Fifth Circuit's judgment should also be affirmed on the ground that the

District Court's decree is a remedial measure to redress pre-existing violations of the Fourteenth and Fifteenth Amendments, and § 2 of the Voting Rights Act of 1965, and to enjoin voting practices perpetuating an existent purposeful denial of minority access to the political process.

The only issues before this Court are whether the quality and nature of the evidence presented at trial on the fact of dilution and purposeful discrimination were sufficient to satisfy appellees' burden of producing evidence, and whether the District Court's finding, affirmed by the Court of Appeals, that appellees had met their burden of persuasion, was clearly erroneous. Because appellees presented sufficient evidence of purposeful discrimination, this appeal can be determined without resolving issues left open in City

of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980), and without deciding whether proof of purposeful discrimination is an essential element of a claim for relief based upon impermissible vote dilution under the Fourteenth Amendent, the Fifteenth Amendment, and § 2 of the Voting Rights Act of 1965.

This appeal can also be decided without determining the general circumstances, if any, under which the vote dilution criteria of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds, sub nom., East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1975), can be applied to identify circumstantial evidence relevant to proving a discriminatory purpose.

The facts in this case are extreme. They depict ongoing efforts by a white

minority, in a jurisdiction with a history of pervasive and continuous de jure discrimination, to exercise plenary political dominion over a black majority. The means chosen to exercise this dominion include political and social isolation of the black majority, and denial or abridgement of their exercise of the franchise.

Through such means, local governmental leaders have perpetuated the purposeful denial of access of the black citizens of Burke County to the political process. This case is sui generis. It should be decided on its own special facts. These facts and the findings of the District Court require, as the Court of Appeals recognized, affirmance of the judgment below. Those findings are not clearly erroneous.

ARGUMENT

I

THE ONLY QUESTION WHICH THE COURT SHOULD DECIDE IS WHETHER THE CIRCUMSTANTIAL EVIDENCE OF DEFENDANTS' DISCRIMINATORY PURPOSE IS SUFFICIENT TO ESTABLISH A VIOLATION OF FEDERAL LAW

In their Statement As To Jurisdiction, appellants assert that this appeal presents a variety of issues for determination by the Court. The principal issue identified by appellants for plenary consideration is whether, and when, the vote dilution criteria formulated by the court below in Zimmer v. McKeithen, supra, can be used to determine circumstances under which the quality and quantum of evidence in a "vote dilution" case will suffice to permit an inference that state or local officials

have adopted or retained for racially discriminatory purposes an at-large voting system which has an adverse impact upon black citizens.

Appellants also argue that Mobile v. Bolden invalidates use of the "Zimmer" criteria, and other criteria employing what appellants deem to be an "effects" standard, as factors to prove purposeful discrimination. Subsumed under the Zimmer issue is a subsidiary question concerning the relevance of, and the weight to be accorded, evidence which shows unresponsiveness by the local legislatie body to the general needs of a minority group whose voting strength is diluted by an at-large system.

Appellants ask the Court to decide that "unresponsiveness" is a fact that is irrelevant to claims based upon dilution

of minority voting strength. Whatever the merits and the importance of these issues generally, plaintiffs' extensive evidence of defendants' discriminatory purpose obviates any necessity for resolving these issues.

To sustain the judgment below, this Court, like the Court of Appeals below, can indulge in the assumption that, under Mobile v Bolden, supra, federal standards governing vote dilution claims require proof that the challenged action was based upon a racially discriminating purpose. The correctness of this assumption, however, need not be determined for it clearly appears from the record that the evidence presented at trial was more than sufficient to prove that defendants had the requisite discriminatory purpose.

This parsing of the questions presented reduces this appeal to a rather routine inquiry concerning the adequacy of circumstantial evidence to prove the elements of a claim for relief based upon impermissible dilution of the voting strength of a minority group.[1/] This issue was resolved by the Court of Appeals in accordance with principles developed by this Court in City of Mobile v. Bolden; Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1972);

1/ Put more precisely, the actual issues presented by this appeal involve a determination of: (1) the scope of a federal district court's power, in an action based upon diminution or cancellation of minority voting strength, to regard proffered pieces of evidence as relevant to proof of the claim; and (2) the extent to which a federal district court can allow proof of the elements of a claim for vote dilution to be established through circumstantial evidence.

Washington V. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). See, also Wright v. Rockefeller. 376 U.S. 52 (1964).

II

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY RECOGNIZED THAT UNLAWFUL DILUTION OF A MINORITY GROUP'S VOTING STRENGTH WAS A VALID CAUSE OF ACTION AND CORRECTLY IDENTIFIED FACTS WHICH EVIDENCE PROOF OF DILUTION

A. Nature of the Claim for Relief

This Court, in numerous decisions, has recognized a citizen's rights under the Fourteenth and Fifteenth Amendments, to require governmental officials to refrain from using invidious means to "minimize or cancel out the voting strength of racial or political elements of the voting popula-

tion."[2/] Fortson v. Dorsey, 379 U.S. 433, 439 (1965). See, White v. Regester, 412 U.S. 755 (1972); Whitcomb v. Chavis, 403 U.S. 124 (1971); Mobile v. Bolden, supra.

Early attempts, such as in Whitcomb v. Chavis, supra, to sue on a claim based upon impermissible dilution of a minority group's voting strength were initially rejected. The grounds for rejection were

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2/ In Fortson v. Dorsey, supra, this Court considered for the first time the validity of a cause of action based upon dilution of a minority group's voting strength. The Court said that:

> It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. 379 U.S. at 439.

varied. In Whitcomb v. Chavis, for example, the claim was rebutted because (1) the challenged multi-member districts were not "conceived or operated as purposeful devices to further racial or economic discrimination"[3/] and because the Court refused to accept the notion that the mere "fact that the number of ghetto residents who were legislators was not in proportion to ghetto population", constituted adequate proof of "invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other ... residents to participate in the political processes and to elect

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3/ The Court concluded therefore that "there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities." 403 U.S. at 412.

legislators of their choice."[4/]

Whitcomb v. Chavis, supra, failed to resolve many of the important questions concerning the nature and description of the bundle of interests encompassed by the right to forestall government action which designedly minimizes or cancels out minority voting strength on the basis of race. It did, however, indicate a need to define

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4/ 403 U.S. at 149. The Court said it:

> discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats. 403 U.S. at 150.

more precisely the constituent elements of the right and the nature of the comcomitant injury[5/] as well as a need to articulate

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5/ In denying relief, the Court expressed some of the reasons for its reluctance to uphold plaintiff's assertion in Whitcomb of a claim for relief. The Court noted that "(t)he voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls." 403 U.S. at 153. The Constitution, said the Court, was not designed to protect racial and other minorities from "suffer(ing) the disaster of losing too many elections." Id. Moreover, the Court stated that it is not a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year." Id. In justifying this conclusion, the Court stated that:

> The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system. 403 U.S. at 155.

a distinction between an unlawful diminution of a minority group's voting strength and a disproportionate or continuous loss of elections at the polls.

In White v. Regester, supra, the first decision by the Court invalidating the use of multimember districts on account of their use to dilute minority voting strength for invidious racial reasons, the Court identified elements of the cause of action and, citing Whitcomb v. Chavis, described plaintiff's burden of proof in the following terms:

> (I)t is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate

in the political processes and to elect legislators of their choice. 6/

B. Evidence of Impermissible Vote Dilution

Following the Supreme Court's decision in White v. Regester, the Fifth Circuit, in Zimmer v. McKeithen, supra, set forth what it termed "a list of factors that courts should consider in evaluating the constitutional permissibility of voting practices

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6/ The Court concluded, based upon its review of the evidence before the District Court, that the District Court had not unreasonably found that "the black community has been effectively excluded from participation in the Democratic primary selection process" ... and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." 412 U.S. at 767. Similar findings and conclusions were reached by the Court with respect to the effects in Bexar County of the at-large system on Mexican-Americans. Implicit in this holding was a judgment by the Court that some form of vote dilution had occurred, that the injury was legally cognizable, and that it was unlawfully brought about by government officials.

alleged to discriminate against racial minorities." 485 F.2d 1297, 1305 (1973). The factors were described in the following manner:

> ... where a minority can demonstrate, a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot provisions for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305.

The decision in Zimmer v. McKeithen, supra, revealed glaringly how acute the

need was to provide a set of evidentiary standards for vote dilution claims based upon racial discrimination. Closely related to this need was the parallel need to identify elements of the cause of action, especially elements of the claim which establish proof of dilution of a minority group's voting strength.

Since the Court of Appeals below purported to apply the Zimmer criteria under circumstances in which the standard of liability was assumed to require proof of purposeful discrimination, it was necessary for the Court of Appeals to determine how these criteria are relevant for determining when an injury for vote dilution exists and how they relate to proof of discriminatory intent.

C. The Zimmer Criteria and Their Significance for Establishing Voting Dilution

The five Zimmer factors, apart from whatever relevance they may have at times for proving discriminatory purpose, bear significantly upon whether a minority group has been rendered helpless in protecting its political and social interests. To that extent, the Zimmer factors, derived from White v. Regester, are indicia of the extent to which a minority group's political defeat at the polls cannot be attributed to the rough and tumble of traditional politics. The Zimmer factors thus serve as determinants of the degree to which vote dilution has occurred and of the need for judicial review.

The severity and permanence of vote dilution are determined by the condition, history, and status of the affected minor-

ity group in the larger community. They are also a function of those characteristics of the electoral process which magnify the ability of the dominant majority to utilize racial discrimination to minimize minority political influence and participation.

Nothing in City of Mobile v. Bolden affects this calculus. The opinion in Mobile did not focus on whether a dilution in black voting strength had occurred. Rather, the concern in Mobile was whether proof of a discriminatory purpose was an element of plaintiffs' claim for relief.

The five factors which the Zimmer Court of Appeals gleaned from White v. Regester and Whitcomb v. Chavis measure the uncouthness or "irrationality" of an electoral system which operates to diminish or exclude minority partici-

pation.[7/] See, Mobile v. Bolden, 446 U.S. at 86. (Stevens, J., concurring). The Zimmer factors are important indicia of when the members of a minority group are likely to be subjected to political isolation and to have common interests which cannot be expressed by taking joint political action.

In addition to showing the degree of uncouthness and irrationality inherent in continued maintenance of a challenged electoral system, these factors indicate the extent to which the system is maintained

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7/ The use of a tenuous state policy to continue the effects of past discrimination against a minority whose access to the political process has been eliminated or curtailed by past discrimination is "uncouth" and "irrational" when carried out by means of an electoral system whose special features are that they inhibit attempts by the minority group to gain access to the political process while helping to elect government officials and lawmakers who fail to exhibit good-faith concern for the political and other needs and aspirations of the minority group.

without neutral justification. They thus satisfy Justice Stevens' requirement for an objective test for measuring dilution. See, Mobile v. Bolden, supra, 446 U.S. at 90-91 (Stevens, J. concurring).

D. Application of the Zimmer Factors to Prove Dilution

Both the District Court and the Court of Appeals considered the extent to which black voting strength had been diluted in Burke County. The Court of Appeals referred to evidence of bloc voting which it found to be "clear and overwhelming". 639 F.2d at 1378. The existence of bloc voting, the Court noted, "enhances the likelihood that those seeking to manipulate the electoral system for discriminatory purposes will succeed". Id., n. 41.

Another circumstance evidencing dilution was the virtual non-existence of

black suffrage before 1965 when the Voting Rights Act was adopted. Also, as the courts below found, "[i]nadequate and unequal educational opportunities, both in the past and present, as the result of official discriminatory acts" intensified the degree of dilution of black voting strength. 631 F.2d at 1378. A reason for the relationship between inadequate education and dilution was given by an expert witness who testified at trial that "one reason Blacks . . . have been ineffective in the political process, is the fact that they have completed less formal education". Id.

Further evidence of the effective exclusion of blacks from participation in the electoral process was found in the "past and present operation of the county's Democratic primary system and in the

Georgia law making it more difficult for Blacks to serve as chief registrar in a county." Id. The political isolation of blacks is reflected in the almost complete absence of blacks from the Burke County Democratic Executive Committee and their exclusion from the political process generally as a result of historical discrimination practiced against blacks. Id.

Another significant fact which the Court found determinative of the presence of dilution was the depressed socio-economic status of blacks. 639 F.2d at 1378. Poverty, lack of equal employment opportunities, and inferior education, the District Court found, had a "direct negative impact on the opportunity for Blacks to effectively participate in the electoral process". Id. at 1379. The Court of Appeals held that this finding was "not

clearly erroneous." Id.

Also found not clearly erroneous was the District Court's finding that blacks were unable, in part, to participate meaningfully in at-large elections in Burke County as a result of the:

> social reality that person-to-person relations, necessary to effective campaigning in a rural county, was virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks. 639 F.2d at 1379.

In this context, the large size of the County, nearly two-thirds the size of the State of Rhode Island, and the majority vote requirement, in conjunction with the need for candidates to run for specific seats and the lack of a residency requirement, increased the likelihood that the electoral system would continue to exclude blacks from the political process. This finding of the District Court

was held by the Court of Appeals to be "sound and well supported". 639 F.2d at 1381.

These findings, made in accordance with the Zimmer factors constitute adequate grounds for a finding that black citizens in Burke County have involuntarily suffered a substantial dilution in their voting strength. A substantial diminution in their available political opportunities, such as evidenced here, is a serious injury which warrants judicial review.

III

PLAINTIFFS' PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT DEFENDANTS HAD A DISCRIMINATORY MOTIVE IN ADOPTING AND MAINTAINING BURKE COUNTY'S AT-LARGE SYSTEM FOR ELECTING COUNTY COMMISSIONERS

On the basis of this Court's decision in Mobile v. Bolden, the Court of Appeals assumed that the governing constitutional

standard under the Fourteenth And Fifteenth Amendments to the Constitution of the United States requires a showing of discriminatory intent by defendants in order for plaintiffs to prove a claim for relief based upon unlawful dilution, or cancellation, of a minority group's voting strength.

Intent, amici curiae submit, is not an element of a claim for relief based upon dilution of minority voting strength. This question, however, need not be reached by the Court in the instant action since the nature and quality of the evidence presented at trial were sufficient to prove the existence of defendants' unlawful discriminatory intent to dilute or cancel out the voting strength of black citizens in Burke County.

A. Standards for Proving Intent.

In Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibits racial discrimination only when a discriminatory purpose is shown for the racially discriminatory action. The Court further stated that none of its previous decisions had "embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact". Washington v. Davis, 426 U.S. at 239. This rule, said the Court was applicable to all claims involving racial discrimination under the equal protection

clause of the Fourteenth Amendment.

The Court acknowledged in Washington v. Davis, supra, that the discriminatory purpose need not be expressed or appear on the face of the alleged discriminatory action. Actions otherwise neutral, the Court observed, might violate the equal protection clause in their application.

The Court in Washington v. Davis offered guidelines for establishing proof of the existence of a discriminatory purpose. It emphasized that a discriminatory purpose could be proved by circumstantial evidence. 426 U.S. at 242. In Arlington Heights v. Metro Housing Corp., supra, however, the Court recognized the difficulty in proving a discriminatory purpose and pointed out that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive

inquiry into such circumstantial and direct evidence of intent as may be available". 429 U.S. at 266.

The Court, in Washington v. Davis and Arlington Heights, gave several illustrations of the means by which circumstantial evidence might be used to establish the existence of a discriminatory intent. As one example, the Court noted that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. at 242. An inference of this nature might be made, the Court said, whenever the circumstances and the discriminatory impact demonstrate, as a practical matter, that the discrimination cannot be explained on nonracial grounds. Id.

The Court emphasized that an inference of discriminatory purpose might emerge in two different ways. First, the inference might be drawn when a clear pattern emerges that is "unexplainable on grounds other than race" even though the action is otherwise neutral on its face. Arlington Heights, 429 U.S. at 266. Second, an inference of discriminatory intent might be based upon what appears to be a "single invidiously discriminatory government act." Id., n. 14.

Next, the Court stated that the historical background of the discriminatory action might be used as circumstantial evidence to prove intent. Arlington Heights, 429 U.S. at 267. In particular, it said that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decision-maker's

purposes". Id. As an example, it pointed out how

> "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. Arlington Heights at 267.

Finally, the Court emphasized that the legislative or administrative history of a law will sometimes be relevant for proving intent. The Court recognized, however, the difficulties which would arise if legislators were compelled to testify about the purposes which they and other legislators were pursuing when enacting the law or which would arise if they were compelled to recall contemporary statements made by them or the other members of the legislature. In citing the need and availability

of such testimony, the Court recognized that it would be necessary to depart from the normal rules barring the use or compulsion of such testimony.[8/] Arlington Heights, 429 U.S. at 268.

The Court's enumeration of the various ways in which discriminatory intent can be proved was illustrative, and not intended to be exhaustive. It confirmed, however,

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8/ On the other hand, the evidentiary inquiry should not focus exclusively or primarily on direct evidence of illicit legislative motive since such evidence is "difficult or impossible" to obtain. Palmer v. Thompson, 403 U.S. 217, 225 (1940). See Mobile v Bolden, supra, 446 U.S. at 134 (Marshall, J. dissenting). Here, the adoption of the challenged practices took place in a legislative body that kept no records, at a time so remote that no contemporaneous witnesses are still alive. Since the passage of the 1965 Voting Rights Act, legislators have become too sophisticated to acknowledge illegal motives. To require direct evidence of legislative purpose would pro tanto repeal the Fifteenth Amendment for black citizens in Burke County.

that the Court's imposition of an intent standard was not designed to constitute an insurmountable obstacle to successful prosecution of racial discrimination claims under the Fourteenth Amendment. It also confirmed that traditional evidentiary rules governing the use of circumstantial evidence are applicable for proving the existence, in racial discrimination cases, of a discriminatory motive.

B. Application of the Legal Standards

Neither Washington v. Davis nor Arlington Heights was a vote dilution case. The problem posed by vote dilution cases is how the principles of Washington v. Davis and Arlington Heights are to be articulated and applied in the context of an action in which the essential claim is that an electoral system is maintained to minimize or dilute minority voting strength.

In its application of these principles, the Court of Appeals conceded at the outset that satisfaction of the Zimmer factors did not per se imply, in each and every circumstance, that the defendants had acted with the requisite discriminatory intent. On the other hand, the Court of Appeals left open the possibility that satisfaction of the Zimmer criteria might, in some cases, be sufficient, when considered in conjunction with other credible evidence, to establish proof of a discriminatory purpose in the maintenance of an at-large system.

What is relevant, therefore, is not the name which the Court of Appeals used either to characterize the evidence or to designate the evidentiary criteria which it applied, but rather the nature of the evidence itself and its relevance to

proving the elements of the cause of action.

Designations such as "Zimmer factors", "dilution of minority voting strength", and "existence of a discriminatory purpose", cannot be used to obscure the fact that this case must be tried and determined in accordance with the same evidentiary rules which are used for the trial of cases. Even if this Court's decision in Mobile v. Bolden is read as imposing an intent standard under the Fourteenth Amendment, the Fifteenth Amendment, and section 2 of the Voting Rights Act of 1965, there is nothing in any of the various opinions written in Bolden which suggests that a special or ad hoc set of evidentiary standards is to be applied in vote dilution cases to determine the relevance and suffficiency of evidence.

The evidence presented by plaintiffs and reviewed by the courts below was admissible evidence under the Federal Rules of Evidence. Rule 402 of the Federal Rules of Evidence adopts the general principle that "[a]ll relevant evidence is admissible". Relevant evidence is defined by Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". See, also McCormick, Evidence (2nd Ed. 1972).. One question therefore which a case of this nature presents is whether evidence proffered at trial is relevant within the meaning of Rule 401.

Relevancy in this trial, as in others, cannot be determined without asking the question "Relevant to what"? Unlike the

case in most other actions, there is no real issue here as to whether the defendants performed the act in question. It is undisputed that these defendants maintain the present at-large system for electing county commissioners in Burke County.

What is at issue is not this fact but their purpose in adopting and maintaining this system. More specifically, the issue is whether defendants' purpose in adopting or maintaining the at-large system is racially discriminatory. Relevancy therefore is directed to this issue. Evidence is admissible on this issue if it has a tendency to make the existence of purposeful discrimination more probable or less probable than it would be without the evidence.

In the context of an action for vote dilution, Rule 401 makes defendants'

motive, or intent, a relevant inquiry. Evidence tending to establish motive or intent is thus relevant. Rule 404(b) of the Federal Rules of Evidence provides some guidance on the type of evidence which can be used to prove intent and motive. It states that evidence of other crimes, wrongs, or acts are admissible for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". Such evidence, however, cannot be used to prove that a specific act was performed. The existence of other bad acts or wrongs can however be used as circumstantial evidence for determining the intent or motive with which a defendant acted.

In applying these rules to the facts of the present appeal, we see first that both direct and circumstantial evidence may

be used, and secondly that evidence of prior wrongs and bad acts may be considered in determining the nature of defendants' purpose. The latter is particularly important in evaluating the significance of defendants' other racially discriminatory actions.

Rules 401 and 404 are especially important in vote dilution cases. Legislators are too sophisticated, since the passage of civil rights laws, to leave direct evidence of their discriminatory purposes lying around waiting to be discovered. Courts recognize, however, that the "right to redress does not turn on the degree of subtlety with which a discriminatory plan is effectuated." Lodge v. Buxton, 639 F.2d at 1358. For this reason, the Courts of Appeals below held that "[c]ircumstantial evidence, of nec-

essity, must suffice, so long as the inference of discriminatory intent is clear." Id.

Plaintiffs presented substantial evidence at trial to show that defendants acted with a discriminatory purpose in using Burke County's at-large system to exclude or lessen participation by blacks in the benefits of the electoral franchise. The Court of Appeals considered this evidence only for the purpose of showing that the County's system of at-large representation was maintained for an unlawful discriminatory purpose. It assumed, on the ground that the at-large laws were adopted at a time when blacks were prohibited from exercising the franchise, that they were not adopted to minimize black political participation.

By indulging this assumption, the court excluded evidence which favored plaintiffs. This was error. Given Burke County's denial in 1911 of the franchise to blacks, the more probable assumption was that county officials intended to limit black political participation whenever possible. They could have reasonably assumed that their denial of the franchise to blacks could not continue indefinitely. Indeed, the District Court should have inferred that county officials in 1911 probably assumed that their ability to deny the franchise would become less effective over time, especially, as the attacks on their practice mounted in strength.

Faced with such a prospect, county officials in Burke County may well have assumed that adoption in 1911 of an at-large system was the only way to prolong their otherwise episodic supremacy over a

majority black population. Since blacks constituted then a majority of the population, the adoption in 1911 of an at-large system had advantages superior to those of a single-member districting system.

With a single member districting system, the large number of black citizens in the County would guarantee that blacks would be able to gain immediate control in one or more of the single member districts. Over time, more districts would be represented by blacks since black registration figures were bound to increase with the passage of time. Democracy's gain would here be a loss for white supremacy.

An at-large system in 1911 would have none of these disadvantages since it would avoid a sharing of political control between blacks and whites, at least until the number of black registered voters began

to approximate the number of white registered voters. The adoption of an at-large system in 1911 was therefore an option well suited for maintaining the reins of government in the hands of white citizens at the expense of black citizens. Thus, it cannot be assumed that at-large schemes adopted during the denial of the franchise to blacks, are for that reason alone, immune to challenges that they were adopted to minimize or cancel out minority voting strength.[9/]

9/ Plantiff's proof that the at-large electoral system was adopted when blacks were denied the franchise is, therefore, "some evidence" that the system was adopted for the purpose of perpetuating the effects of past discrimination. Since the courts below took a contrary view of the significance of the adoption of the at-large system during an era when blacks were not permitted to vote, plantiff's evidence concerning defendants' discriminatory intent was thus never fully assessed by the District Court and the Court of Appeals. Failure to take it into account may warrant a remand if the judgment below is not affirmed.

Both the District Court and the Court of Appeals regarded the virtual absence of black suffrage before the passage in 1965 of the Voting Rights Act as a critical factor. Also critical was the increase during the short period from 1965 to the present of black suffrage, measured in terms of registered voters.

Starting from a base of almost zero, the percentage of black registered voters is today somewhere between 38% - 44% of the black population. This phenomenal fact, brought about solely through federal intervention on the side of black suffrage, warranted a finding, and the District Court so found, that:

> the marked increased in the registration Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this

date. 9/ Order at p. 7. Also, see Lodge v. Buxton, 639 at 1378.

This evidence of the change in the availability of the franchise to black citizens in Burke County is relevant on two points. First, it provides cumulative evidence that the entire electoral process in the county was used systematically to deny and curtail the right of blacks to vote.

It thus evidences a massive violation of the Fourteenth Amendment, the Fifteenth

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9/ Technically speaking this is not the type of procedural or substantive departure from normal practice which is included in the list of criteria provided in Arlington Heights. It is, however, within the spirit of what the Arlington Court contemplated as factors relevant to proving intent. The departure here is not between what local law was before and what it was after 1965, but between two time periods, one in which the County and the State claim that they were not discriminating on the basis of race, and one in which federal law must intervene to prevent further discriminatory state action adversely affecting the exercise of the franchise by blacks.

Amendment, and section 2 of the Voting Rights Act. It also causes the focus of this case to shift from the question of whether maintenance of the at-large system is a violation of federal law because of the purpose in maintaining it, to the question of whether the dismantling of the at-large system is a remedial measure for redressing systemic violations of the right of blacks to exercise the franchise. See, Green v. New Kent County School Board, 391 U.S. 430, 437-38 (1963); Louisiana

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9/ footnote (continued)

The contrast between the two time periods, and the events occurring therein, is probative of whether defendants restrict the exercise of the franchise by blacks. The implication, of course, is that federal intervention was required to prevent Burke County from denying the franchise to black citizens. This is a fair inference from the evidence. This circumstance distinguishes the present action from that in Mobile v. Bolden.

v. U.S., 380 U.S. 145, 154 (1965); Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977). See also Section IV, infra,.

The second point to which this evidence goes is defendants' motive for engaging in such massive denial of the franchise to blacks. Obviously, there is evidence here that defendants had a discriminatory motive in their de jure denial of the franchise. Under Rule 404(b) of the Federal Rules of Evidence, this evidence is admissible to prove defendants' motive, or intent, with respect to similar actions having a discriminatory impact upon black voters in Burke County, such as maintaining the county's at-large system.

Other evidence showing the exclusion of blacks from the political process was considered in great detail by the Court of

Appeals. For example, the Court considered the State's use of the "white primary", subsequently struck down by this Court in Chapman v. King, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946). It also assessed the purposes which legislatures had in mind in enacting a law making it difficult for blacks to serve as a chief registrar in a county in Georgia. See Ga. Code Ann. § 34-605.

Also assessed were the circumstances which contributed, in part, to the virtual exclusion of blacks from the Burke County Democratic Executive Committee. These were relevant factors, under Rules 401 and and 404 of the Federal Rules of Evidence for determining the defendants' motives in maintaining the present electoral system.

Much of appellants' attack on the judgment below stems from the probative value attributed by the Court of Appeals'

to evidence presented by plaintiffs showing that County officials with legislative and administrative responsibilities were unresponsive to the general and particular interests of black citizens in carrying out their duties. Appellants question in this appeal both the relevance of this evidence and the weight which may have been attributed to it as an indicator of defendants' intent to discriminate.

As amici demonstrated earlier in this brief, evidence of unresponsiveness is always relevant on the fact of dilution. It may, however, as in the present case, sometimes be relevant to proving the existence of a discriminatory purpose.

Where evidence is offered in a vote dilution case to show that legislators are unresponsive to the compelling legitimate interests of a sizable racial or ethnic

minority, and that it is indifferent to the adverse consequences which an at-large electoral scheme may have upon the members of that minority, then it is natural to inquire why the gross indifference exists and whether the evidence which shows the existence of the unresponsiveness is evidence which also shows that the legislature is engaging in purposeful racial discrimination against members of the minority group in other areas of life. The answers to questions such as these is what determines in a specific case whether particular items of evidence which show unresponsiveness are relevant to proving that defendants had the requisite discriminatory intent.

In the instant action, the evidence showed that defendents and other public officials were unresponsive to black

interests in almost every major segment of political and social life, such as voting, schools, employment, appointments to public office, municipal services, etc. The unresponsiveness was of such breadth and magnitude that the Court of Appeals properly deemed the County Commissioners' insensitivity to be unexplainable except "as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination." 639 F.2d at 1377. See, Arlington Heights, 429 U.S. at 266.

The totality of defendants' unresponsiveness was sufficiently extreme that the Court of Appeals concluded that to find anything other than a conscious effort to maintain the invidious effects of racial discrimination "would be to fly in the face of overwhelming and shocking evidence". 639 F. 2d at 1377. Under the Arlington Heights

criteria, it was appropriate for the courts below to draw such an inference. In sum, the Court of Appeals, in assessing the District Court's evaluation and weighing of the evidence, did no more than to attribute to the evidence, including evidence on unresponsiveness, the probative value and significance which the evidence was entitled to receive in reason, logic and experience.

IV

THE THREE CHALLENGED VOTING PRACTICES AND PROCEDURES PERPETUATE A PURPOSEFUL DENIAL OF ACCESS OF BLACKS TO THE POLITICAL PROCESSES IN BURKE COUNTY AND MAY BE ENJOINED AS A REMEDIAL MEASURE

The judgments of the courts below are also sustainable as an appropriate and necessary remedy of an extant constitu-

tional violation of the Fourteenth and Fifteenth Amendments.[10/]

The District Court found that the system for electing County Commissioners perpetuated an existing purposeful denial of any opportunity for blacks to participate in the county government. These factual findings were upheld by the Court of Appeals.

Under the approach of White v. Regester, supra as developed in Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) (en banc) cert. denied, 434 U.S. 968 (1977), the relevant inquiry for a "remedy" case is whether the

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10/ We do not address in this brief the question whether the three challenged voting practices also abridge the rights of black voters in violation of Section 2 of the Voting Rights Act simply because of their discriminatory effect. On that question, we incorporate by reference, Brief for Georgia Association of Black Elected Officials, et al. as Amici Curiae, Rogers v. Lodge, No. 80-2100.

challenged voting practices continue prior purposeful voting rights violations. While a plurality of this Court has held in City of Mobile v. Bolden, that a showing of racial motivation is a necessary ingredient of a Fourteenth or Fifteenth Amendment violation, a majority of the Court has held, in other areas of racial discrimination, that once a de jure constitutional violation is shown, the state's actions will be judged by the continuing effects of its past, purposeful conduct. Keyes v. School District No. 1, 413 U.S. 189 (1973); Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972); Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 26(1971). See also, Columbus Board of Education v. Penick, 443 U.S. 449, 538-39 (1979).

If analyzed therefore as a remedy case, given the record of past, purpose-

ful racial discrimination and official unresponsiveness, the District Court's findings,[11/] and the long history of racial discrimination by appellants and the State of Georgia, the standard for appellate review is simply whether the remedy imposed by the district court was justified and appropriately tailored to cure the "condition which offends the Constitution." Milliken v. Bradley, 433 U.S. 267 (1977).

Having determined that blacks in Burke County were historically denied an oppor-

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11/ The District Court made specific findings concerning the way in which the three voting practices in question -- (1) at-large voting, (2) numbered post requirement, and (3) majority run-off -- perpetuate the effects of past, de jure racial discrimination in Burke County (J.S. 71a-77a, 92a-93a). The District Court also found that the officials responsible for governing Burke County have acted to maintain the inequities created by that past discrimination. (J.S. 77a-82a)

tunity to participate in the County government and were intentionally excluded from the electoral process, the District Court carefully examined the nexus between that prior history and appellees' continued inability to participate effectively in the political process. The court found a link between past purposeful discrimination[12/] and (1) low black voter registration and participation (J.S. 71a-72a); (2) racial bloc voting by whites against any black candidate or any white candidate identified with the interests of the black community (J.S. 72a-73a); (3) barriers to black candidacies stemming from the "personal contacts politics of Burke County" (J.S.

12/ "This litany of past history -- much of it relating to official action -- also commands a conclusion that in significant aspects it was purposeful and intentional," Kirksey v. Board of Supervisors, 554 F2d at 144.

88a-89a);[13/] (4) the low socio-economic status of blacks as a group and the size of the county, in combination with the numbered-post and majority vote run-off requirements, and (4) the exclusion of blacks from county government based on the Commissioners' failure to appoint blacks to committees and boards in a meaningful fashion (J.S. 78a) and the Commissioners' racially discriminatory pattern of decision making in the distribution of public goods and services (paving county roads, J.S. 79a; county hiring, J.S. 79a; donation of county funds to buy band uniforms for the all-white private school, J.S. 82a).

13/ "...Blacks are shut out of the normal course of politics in this tightly-knit rural county...(given) the virtual segregation of all social, religious, and business organizations." (J.S. 89a)

The record shows, and the District Court found, that the relationship between the past purposeful discrimination and present conditions is not remote. (See, e.g. discriminatory exclusion of blacks from Grand Jury until 1977, abated only after litigation, J.S. 75a; The existence of unpaved roads to the predominantly black school, J.S. 80a; failure to establish additional registration sites for more than a few months and only after a pre-trial conference, J.S. 81a; disproportionately low registration rate of blacks even after the passage of the Voting Rights Act of 1965, J.S. 72a; virtually "lily-white" Democratic Party County Executive Committee despite a clear mandate from national and state charters, J.S. 88a; segregated public facilities and places of public accommodation until the 1960's, segregated schools

until 1969, and some schools still essentially segregated, J.S. 74-76a).[14/]

Although the explicit disfranchising requirements in Burke County have been suspended by federal legislation or abandoned after litigation, and although appellants have recently ceased many of the

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14/ In its Brief for United States as Amicus Curiae, Lodge v. Buxton, 639 f.2d 1358, States observes that the relationship between the past discrimination and present conditions in Burke County is not attenuated. "The court below noted that 99% of the black residents of Burke County and over 75% of the white residents were born in Georgia. Enforcement of the racially discriminatory laws, customs and practices...by the State and its agencies did not cease until the late 1960's in some instances and even later in others. Thus, virtually all of the black residents of voting age in Burke County and three-fourths or more of such white residents have been subjected throughout their lives to a social and legal structure founded on the proposition 'that the Negro is in no respect the equal to the white man', "Brief for United States at 28 (citations omitted).

overtly racial practices described at length in appellees' brief and the opinions below, the courts below concluded that appellants have "never actively set out to eliminate the consequences of...past intentionally ...[discriminatory] policies." Columbus Board of Eduation v. Penick, supra, 443 U.S. at 461. Where a defendant has violated the constitutional rights of a minority group on account of race, discontinuation of the violation is not an adequate remedy if conditions flowing from the constitutional violation continue to disadvantage the victims of the violation. Milliken v. Bradley, supra, 433 U.S. at 281-82.

The District Court determined, and the Court of Appeals affirmed, that blacks continue to be excluded from participation in the political and governmental processes

of Burke County as a result of both the lingering effects of recent prior discrimination and the continued use of the three challenged voting practices.[15/] Enjoining the use of those voting practices was, therefore, justified as an appropriate and proper exercise of the court's remedial power. White v. Regester, supra, 412 U.S. at 765-70; Milliken v. Bradley, supra, U.S.

15/ While a plurality of this Court in Mobile rejected an "effects" standard for proving a violation under the Fourteenth and Fifteenth Amendments, the Court in Mobile specifically declined to overrule White v. Regester, supra, where a unanimous Court endorsed the use of single-member districts "to remedy the effects" of past discrimination against Mexican-Americans. 412 U.S. at 769. For an extended discussion of the general constitutional principles involved in framing equitable remedies, see Brief for the United States as Amicus Curiae Lodge v. Buxton, supra, at 19-25. See, also, Brief for the Lawyers' Committee for civil Rights Under Law as Amicus Curiae, Rogers v. Lodge, No. 80-2100, at 16ff.

at 282 (1977); Louisiana v. United States, 380 U.S. 145, 154 (1965).[16/]

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted

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16/ (T)he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, id. at 154.